The Application of A-National Principles in International Commercial Arbitration and Its Implications

Hong-lin Yu

A thesis submitted in partial fulfilment of the requirements for the degree of Ph.D. to the Faculty of Law in the University of Edinburgh

1998

Contents

Abstract

A-national principles as discussed in this thesis mean broadly the principles whose origins and formation have no direct connection with any particular states by contrast with national laws. They include general principles of law and the new *lex mercatoria* together with amiable composition. Over thirty years, a-national principles have frequently been applied in international commercial arbitration to decide the substantive issues of the dispute, either by the choice of the parties or the decisions of arbitrators. Such a practice is particularly welcomed by proponents of international commercial arbitration who have sought to create a truly international system with minimum interference by the courts at the place of arbitration or elsewhere and with awards enforceable anywhere in the world.

Within the present framework, arbitration draws upon national laws, by reference to which, questions as to whether and to what extent arbitration agreements and awards will be enforced are answered. The validity of the choice of a-national principles also has to be determined under the laws of the states connected with the arbitration. This is evident where arbitrators have to reach their decision on the basis of a specific national law in accordance with the laws of the countries connected with the dispute. Thus, the parties' freedom to select the proper law may be incompatible with the provisions of domestic laws.

The application of a-national principles is controversial. However, this thesis will not examine the arguments for or against such an application. Its main aim is to examine the practice of applying a-national principles and the sometimes hostile reception this receives in national courts. Whether this can be sufficiently accommodated by the existing theories of arbitration will also be examined.

Part One of this thesis, a background study, highlights the changes in the traditional three-step rule on choice of law on contract in international commercial arbitration. Part Two presents the result of study of *ad hoc* and ICC arbitral awards which shows that a-national principles are increasingly applied in such arbitration. Using comparative analysis, Part Three examines the diverse attitudes held by different national courts which are in different regions and at different stages of development in the area of such arbitration. Part Four examines the conflict with the existing theories of arbitration and suggests a new approach that corresponds more closely with the application of a-national principles and the development of arbitration in an international commercial context.

Declaration

I hereby declare that the following thesis has been composed by myself and is my own work.

Hong-lin Yu

1997

Acknowledgement

I wish to acknowledge my gratitude to Professor Murray for his inspiring and unsparing help during my studies. His guidance and support while preparing for this thesis was essential to its completion. To Dr. Leslie, his wife Helen, Mr. Scott Dickson and Mrs. Shu-fang Lai I wish to express my deepest respect and thanks. To my family I owe a debt of gratitude for their patience and financial support they provided during these years. Special thanks are due to Mr. James Anthony Japp and his family who offered support and encouragement, in my personal and academic life while in Scotland.

"To dream the impossible dream..."

Don Quixote

The Man From La Mancha

Chapter One

Introduction

The foundation of this thesis is an investigation into the application of a-national principles as the substantive law of contracts in international commercial arbitration and the attitudes held by different national courts towards such an application. The scope of a-national principles will concentrate in the terms of the "general principles of law", the "new *lex mercatoria*" and "amiable composition". Specifically, this thesis will examine the legal interpretation of a-national principles with a special emphasis on a comparative study of the arbitral awards of the International Chamber of Commerce (the ICC) and of six domestic jurisdictions (England, France, the United States, Hong Kong, China and Taiwan). A comparison of their different approaches towards the issue of a-national principles will be discussed. In addition, this study will investigate the prospects for clarification of a-national principles by searching for a more appropriate approach against a background of the present framework of international commercial arbitration.

These issues are mainly discussed through an examination of data resulting from inquiries into (1) the literature on the application of the general principles of law, the new *lex mercatoria* and amiable composition, (2) a number of international arbitral awards published in the Journal of *International Legal Materials*, (3) the ICC arbitral awards published in the *Yearbook of Commercial Arbitration* and *Collection of ICC Arbitral Awards* and (4) the domestic case law and arbitration law on the subject.

This introductory chapter comprises six sections. It will start with a general discussion of the topic of the thesis. This will be followed by a discussion centred on the terms used in this thesis - which includes "international commercial arbitration", "parties", "applicable laws", and "a-national principles". A further section will focus on the scope of the research. In addition, the object of this study will be explained. Furthermore, the methodology used in this thesis will be given. Finally, in the last section, a structure of this thesis will be provided.

1.1 General discussion

In the international commercial community, international commercial arbitration is regarded as an alternative mechanism outside national courts to settle disputes arising from international commercial transactions. The main reason behind the popularity of this mechanism is that it provides predictable and speedy decisions and is based on the theory of party autonomy. In principle, party autonomy allows parties to exercise their freedom in choosing the arbitrators[1], the place of arbitration, the applicable laws, deciding how the arbitral procedures shall be carried out and the extent of the arbitrator's powers within the arbitration framework. In other words, the ideal of this mechanism is to leave parties with a great deal of control over matters concerning how the decision-making process shall be conducted.

Under a valid arbitration agreement, arbitrators, whether directly or indirectly appointed by the parties, have to discharge their duties by determining contractual duties and obligations of the parties and then by making an arbitral award. In order to

[1]The term "arbitrators" also includes the term "arbitral tribunal" which can consist of a single arbitrator, more than one arbitrator, or an umpire (also referred to "arbitral tribunal"). Reference to "arbitrator" is also to be taken to include the Scottish form "arbiter".

do so, they have to determine the law governing the substantive issues arising from the case. There are two ways for arbitrators to arrive at a decision on which law applies to the substantive disputes. First, party autonomy is accepted and respected in most jurisdictions, that is to say, the choice of the substantive law is first determined by the reference to the agreement of the parties or to any rules to which the parties have agreed. According to the choice of law rules, in the case where the parties express their choice of law, arbitrators are obliged to apply the laws specified by the parties. Secondly, in the case where the parties fail to agree on the proper law, arbitrators have the powers and duty to choose the substantive law in accordance with the so-called "implied choice" test or the "closest and most real relationship" test set out in the choice of law rules of the place of arbitration. Traditionally, in most arbitration cases, a national law is usually chosen to govern the substantive disputes under these circumstances, whether expressed or implied.

However, choice of a national law as the proper law of a contract has lost its predominant role in international commercial arbitration. A review of the international commercial arbitration cases of the past twenty years highlights a trend of choosing a-national principles as the substantive law in the major international commercial contracts.[2] Such a choice of a-national principles as the proper law can be made by the parties or by the arbitrators who regard it as the most appropriate choice under the circumstances.

Since the 1960s the application of a-national principles, such as the general principles of law, the new *lex mercatoria* or the concept of amiable composition,[3] as the

[2]Goode, "Usage and Its Reception in Transnational Commercial Arbitration", (1997) 46 *I.C.L.Q.* 1.
[3]Strictly speaking, concepts like amiable composition or deciding the case *ex aequo et bono* are not applications of laws, but applications of "non-legal" principles. Although the applications can be a-legal, they do have legal implications involved in the case of international commercial arbitration.

substantive laws of contracts in international commercial arbitration has caused a great deal of concern and debate which encompasses its history, nature and sources. The most controversial issue of this application is the fear that the predictability of international commercial arbitration may be destroyed because of the application of such general principles of laws, the new *lex mercatoria* or amiable composition.

The majority of jurisdictions require the arbitrators to decide the disputes in accordance with the law designated by the parties within the restrictions of public policy or mandatory rules. Given the freedom in specifying the applicable laws, international business people are willing to utilise the mechanism of international commercial arbitration. With this important support from the international commercial community, the individual states have offered international commercial arbitration more breathing space. As the United States Supreme Court observed:

> "Uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict of laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. [Absent such agreements, one enters] the dicey atmosphere of ... a legal no-man's land [which] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[4]

Nevertheless, sometimes, the ideals of predictability and efficiency that arbitration promises can not be achieved because of the possible complicated situations caused by choice of law issues.[5] The choice of law issues may arise when the parties fail to specify which law is to be applied by the arbitrators to decide the merits of disputes in

---

[4] *Scherk v. Albert-Culver Company* 417 US 506 (1974) pp. 516-517. See also the *Restatement (Second) Conflict of Laws* section 187 comment e (1971); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473, US 614 (1985).

[5] Born, *International Commercial Arbitration in the United States - Commentary & Materials*, (1994), at p. 100.

their arbitration agreement, or the arbitrator's duty to decide the dispute according to law is exempted by the parties' agreement, or even the choice of a-national principles is involved. In addition, this issue frequently leads to uncertainty about the validity of the arbitral awards. As Professor Lando pointed out:

> "the freedom [that international arbitral tribunals possess in selecting the governing law] has been useful in some cases. However, it has also led to some unpredictability. With the growing use of international arbitration this uncertainty has become a matter of concern to parties. They see no attraction in unpredictable conflict of laws rules. They need some degree of certainty as to the law applicable when drafting their contracts, when seeking a friendly settlement of their dispute and when resorting to arbitration."[6]

No matter which of the situations mentioned above appear, they all provide arbitrators some leeway to decide the disputes by applying the law they deem appropriate, or, not according to the strict rules of law. Since 1960, international arbitral tribunals have frequently shown their willingness to decide the disputes submitted before them on the basis of the so-called general principles of law, the new *lex mercatoria* and amiable composition, while such applications also reflect the modern trend towards "a-national" arbitration.

For more than three decades, the concept and application of a-national principles has caused ambiguity and controversy both in practice and theory. With respect to the general principles of law, their application was refused on the ground that the subject of these principles are sovereign states. Moreover, rights and obligations of private individuals shall be governed by municipal laws.

---

[6]Lando, "Conflict of Law Rules for Arbitrators", in *Festschrift Zweigert*, (1981), at p. 159 .

The new *lex mercatoria* is sometimes regarded as interchangeable with the *lex mercatoria*, law merchant, international trade law and trade usages.[7] Though there are certain differences between these terms, most scholars agree that the new *lex mercatoria* has developed from trading circumstances, largely invoked by French and Swiss scholars. Considering the deficiencies of the national laws, especially those of the under-developed countries, they argue that international commercial transactions should be subject to a special set of rules existing in the commercial community.[8] They further believe that the rules of the new *lex mercatoria* can be found in the trade usages developed in the different areas of international trade, for example: standard clauses, uniform laws or even the general principles of law.

However, this view is not shared by all scholars. In the case of the new *lex mercatoria*, its application is resisted because of its unclear definition. Opponents of the new *lex mercatoria* argue that no so-called universal *lex mercatoria* exists, but merely a variety of *lex mercatoria* systems depending on a sector of international trade or a specific region. Furthermore, this law has a very limited application since they only govern a few matters and they are adopted by a limited number of countries.[9] The opponents believe that such reference can cause some difficulties because "the *lex mercatoria* still appears too vague, unclear and limited to offer a satisfactory guideline for arbitrators. Anyone opting for the *lex mercatoria* should be anxious about the free hand he leaves the arbitrators in the interpretation of the norms attributed to this *lex mercatoria*."[10]

---

[7]In order to have consistency, the term "new *lex mercatoria*" will be used throughout this thesis.
[8]Medwig, "The New *Law Merchant*: Legal Rhetoric and Commercial Reality", *L. & Pol.Int'l.Bus.*, 589 (1993). Also, Rivikin, "Enforceability of Arbitral Awards Based on *Lex Mercatoria*", (1994) *Arbitration International*, p. 67.
[9]See Mustill, "Contemporary Problems in International Commercial Arbitration: A Response" (1989) 17 *Int'l Bus. Lawyer*, pp. 161-164. Also, van Houtte, *The Law of International Trade*, (1995), at p. 399.
[10]van Houtte, *The Law of International Trade*, (1995), at p. 399.

In the case of amiable composition, the term, as well as the new *lex mercatoria,* is frequently used interchangeably with making a decision *ex aequo et bono* or deciding the case on the basis of equity. According to a strict legal interpretation, these three terms slightly differ from each other. An arbitrator can make a final and binding arbitral award if he is authorised to decide the case *ex aequo et bono*, whereas amiable composition is a recommendation from an arbitrator who is not required to decide the case following the strict rules of law. Equity is a device whereby the arbitrator or judge may decide the case by reference to good conscience and is not obliged to follow the strict rules or law. Nevertheless, the difference is very slight and infrequently made in most legal literature, arbitration rules and arbitration laws. It is not the purpose of this work to provide a clear distinction between these three terms; therefore, while discussing the issue involving the application of equity, I will mainly use amiable composition or *ex aequo et bono* in order to provide for consistency in this thesis and accommodate the interchangeable terms used in various sources.

The same argument for and against the application of the new *lex mercatoria* also appears in the debate concerning the application of amiable composition. One side of the argument maintains that allowing arbitrators to decide cases on the basis of *ex aequo et bono* or amiable composition reflects the equity and the flexibility of international commercial arbitration, whereas the other side of the divide argues that, lacking effective supervision of this power, it may be abused since the arbitrators do not need to apply the strict rules of law.

Despite these theoretical arguments, in practice, the decision to resort to the general principles of law, the new *lex mercatoria* or amiable composition would be challenged

if a party's home country, or the countries where the arbitration is held or where a party sought enforcement of an arbitral award, refuses to recognise an award determined under either system. In other words, the autonomy of parties and arbitrators in choosing the new *lex mercatoria* or amiable composition is by and large determined by the degree of intervention and supervision exercised by the courts of the place of arbitration and the place where enforcement is sought. In a number of states, such as France and Switzerland, the courts are ready to recognise these applications, whereas some national courts, such as those in Thailand, have displayed a readiness to interfere with the process of choosing the new *lex mercatoria* or amiable composition as the proper law of the contract.

Though quite a number of arbitral awards have been decided on the basis of a-national principles, different national courts have shown different levels of acceptance towards such an application. Due to these different attitudes, the validity of the awards made on such a basis is uncertain. It is the purpose of this thesis to examine the application of a-national principles as the proper law of a contract by international arbitral tribunals and the different levels of tolerance shown towards such applications by different national courts. In addition, the development and application of a-national principles in international commercial arbitration will also be discussed. In the interests of the focus of this thesis, the scope of it will be limited to the issues concerning the application of a-national principles as the proper law to decide the disputes arising from the main contract between the parties in international commercial arbitration. Furthermore, the validity of the awards made on such a basis brought before the national courts of England, France, the United States, Hong Kong, China and Taiwan will be discussed as well as the possibility of the evolution of world-wide a-national principles for the creation of a shared system of supranational arbitration.

1.2 The definitions

1.2.1 International commercial arbitration

The discussion in this thesis is limited to international commercial arbitration. Since different definitions have been suggested for the terms "international" and "commercial", we will examine these two terms individually.

International

The term "international" is used to differentiate from domestic arbitration which has only one single national element involved and is conducted within national boundaries. Generally speaking, international commercial arbitration involves the arbitration which has one or more foreign elements. This distinction is important both in practice and theory since most countries adopt the dual system for commercial arbitration: that is, states have different sets of rules regulating international commercial arbitration and domestic arbitration. Generally speaking, unlike domestic arbitration, international commercial arbitration enjoys less judicial interference from national courts. Distinguishing international arbitral awards from domestic ones is particularly important at the stage of recognition and enforcement of arbitral awards.

Two main methods are frequently used in determining whether an arbitration is international. One is the test of "identity of the parties"; the other one is the "nature of the dispute" test. According to the first test, an arbitration will be characterised as international providing, in the case of individuals, their nationality or habitual place of residence, or in the case of corporate entities, their place of incorporation or the seats

of their management and control, are situated in different countries.[11] As far as the "nature of the dispute" test is concerned, it analyses the elements involved in the arbitration and an arbitration will be regarded as international providing any interests of international trade are involved.[12] This test can frequently be seen in institutional arbitration rules and the arbitration laws of the countries which have more liberal attitudes towards arbitration, such as the ICC[13] and the French Code of Civil Procedure.[14]

Since both tests have their supporters, a universally agreed definition has never been reached. In this work, the term international will be defined according to a combined test developed by the draftsmen of the UNCITRAL Model Law, which gives "international" a wider definition. Viewed from the rapid development of international commercial arbitration, the UNCITRAL Model Law not only embraces both the "identity of the parties" and the "nature of the dispute" tests but also two other tests: the "situs test" (satisfied where the situs of the arbitration proceedings is outside the place of business of one of the parties) and the "opt-in test" (satisfied where the parties expressly agree that the subject matter of the arbitration agreement relates to

---

[11]The approach of "identity of the parties" is adopted in the European Convention on International Commercial Arbitration. Article 1(1)(a) of the Convention stipulates that the scope of the application covers the "arbitration agreement concluded for the purpose of settling disputes arising from international trade between physical and legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States". Also see Article 176(1) of the Swiss Private International Law Act which provides that an arbitration is international if the seat of arbitration is situated in Switzerland and, at the time the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland." A similar approach is also adopted in England.

[12]Redfern & Hunter, *International Commercial Arbitration*, (2nd ed. 1991), at p. 15 (hereinafter Redfern & Hunter (1991)).

[13]Article 1.1 of the ICC Rules provides that "The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with these rules."

[14]Article 1496 of the French Code of Civil Procedure stipulates "Arbitration is international if it implicates international commercial interests."

more than one country). This combined approach is a compromise between different arbitral jurisdictions.

In accordance with the combined definition adopted in the UNCITRAL Model Law, an arbitration is in the first place an international one if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States."[15] Secondly, following the test of the nature of the dispute, it provides that an arbitration is international if the place of arbitration[16] *or* any place where a substantial part of the obligations of the commercial relationship are to be performed *or* the place with which the subject-matter of the dispute is most closely connected[17] is situated outside the State in which the parties have their place of business. Finally, an arbitration is international if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[18]

Commercial

To distinguish international commercial arbitration from international arbitration, one point which has to be stressed is that international commercial arbitration only governs disputes arising from international commercial transactions, rather than those arising from international political disputes between States, such as war or boundary disputes. Therefore, international arbitration which involves the public interests of states is excluded from the discussion in this work.

---

[15]Article 1(3)(a) of the Model Law.
[16]Article 1(3)(b)(i) of the Model Law.
[17]Article 1(3)(b)(ii) of the Model Law.
[18]Article 1(3)(c) of the Model Law.

The definition of "commercial" differs from country to country. Some countries interpret the term "commercial" as widely as possible whereas others adopt a more narrow definition. In this thesis, a wider interpretation of "commercial" will be adopted in order to cover matters arising from all relationships of a commercial nature. In the opinion of the writer, the footnote to Article 1(1) of the Model Law can be a very sophisticated statement for the interpretation of "commercial" used in this thesis. It states:

> "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

1.2.2 Parties

Issues Concerning States or State Entities

In this thesis, the expression "parties" means private parties, both individuals and corporate entities, conducting international commercial activities. The term "parties" used here also includes state entities and states which are involved in international commerce. Following the development of the restrictive theory of sovereign immunity, states or state entities can no longer claim immunity in an arbitration case which has commercial interests involved. Consequently, states or state entities which conduct international commercial activities are included in the category of private parties in international commercial arbitration.

Characterising states and state entities which are involved in international commerce as private parties in international commercial arbitration caused a great deal of controversy until the emergence of the restrictive theory of sovereign immunity. Before the appearance of the restrictive theory, the absolute theory had a dominant role on the issue of sovereign immunity. The absolute theory invokes that a state can claim sovereign immunity over any actions carried out in the name of the state which not only cover the public or political activities but also the commercial activities carried out through its state agents.[19]

However, with the increasing engagement in the trade activities and contractual obligations by the sovereign states, the application of the principle of absolute sovereign immunity created obstacles to international trade conducted between states and private parties because private businessmen were forced into a disadvantageous position when a state or its state entity could avoid responsibility by claiming absolute sovereign immunity. Furthermore, it was clear that justice would not be guaranteed to private businessmen under the doctrine of absolute sovereign immunity.

Under these circumstances, the proponents of the restrictive theory have argued that the sovereign immunity should only be exercised within a reasonable scope. Accordingly, sovereign immunity can only be invoked if the action was done for a public purpose. In other words, no immunity can be claimed if a commercial purpose

---

[19]The idea of the absoluteness of sovereignty was developed a long time ago. Following this theory, the immunity enjoyed by a state is absolute. The immunity does not only cover the public or political activities done by a state, but also the commercial activities done by any state entities. The sovereign immunity issue was first expressed in the case of *The Schooner Exchange v. MaFadden and others* 7 Cranch 116 (1812) and was firmly established by the leading case of the *Pisaro* 255 US 216 (1921) in the United States. In England, see *The Prins Frederik* case 2 Dods. 451 (1820), *Duke of Burnswick v. King of Hanover* 2 H.L.C. 1, (1848), *De Haber v. Queen of Portugal*, 17 Cl. B. 171, (1851).

or interest is behind the action. Being influenced by this theory, states, especially in Europe, started to move away from the doctrine of absolute sovereign immunity.

Throughout the development, both national courts[20] and the international institutions have changed their opinion about "absolute sovereign immunity". For instance, The Permanent Court of International Justice gave a judgment on the case of *Socobel v. The Greek State*[21] on this issue. In this case, the Court dismissed the Greek Government's plea of sovereign immunity for its actions. The Court did not agree that the economic activities conducted by the Greek government entitled it to be immune from the execution.

Considering the changes in national courts and taking the United States as an example, the attitude held by the American courts favouring absolute sovereign immunity was challenged in the case of *United States v. Deutsches Kalisyndikat.*[22] In this case, a French corporation owned and controlled by the French Government was charged by the United States Government. The court held that the governmental activity was primarily commercial in character, therefore, the party should not enjoy immunity. Meanwhile, the American courts began to decide the sovereign immunity issue on their own initiative, rather than solely relying on the suggestions passed on from the

---

[20]This changes can be seen in the discussion of the Austrian Supreme Court in the case of *Dralle v. Rep. of Czechoslovakia* (1950) 17 *I.L.R.* 155. The Supreme Court of Austria first illustrated the development of the theory of sovereign immunity as follows:

> "The classic doctrine of immunity arose at a time when all the commercial activities of states in foreign countries was connected with their political activities..."

However,

> "states not only engage in commercial activities nowadays, but also compete with their own nationals and foreigners. Therefore, the classical doctrine of immunity has lost its meaning and, ratione cessante, can not be recognised as a rule of international law."

In England, *the Philippine Admiral case* [1976] 2 WLR 214, brought to an end the rule of absolute sovereign immunity. Also see *Alcom v. Republic of Columbia* [1982] 2 All ER 74.

[21]*Socobel v. The Greek State* [1951] 18 *I.L.R.* 3 (Tribual Civ. Brussels).

[22]*United States v. Deutsches Kalisyndikat* (1929) D.C. 31 F. 2d. 199.

executive branch. Although it took longer for the American courts to move away from the idea of absolute sovereign immunity than the courts of other countries, the Tate Letter[23] issued by the Legal Advisor of the United States in 1952 confirmed an approach which favoured the theory of restrictive sovereign immunity. It said:

> "... the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons, it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of the requests of foreign governments for a grant of sovereign immunity."

In 1964, sometime after the Tate Letter, the cases of *Banco National de Cuba v. Sabbatino*[24] and *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*[25] confirmed that the American courts had finally accepted the theory of restrictive sovereign immunity.[26]

1.2.3 Applicable laws

In international commercial arbitration, the expression "applicable laws" indicates four possible choice of laws which govern the different aspects of arbitration. They are: (a) the substantive law governing the merits of the parties' main contract and any related claim;[27] (b) the substantive law governing the parties' arbitration agreement; (c) the

---

[23]26 Department of State Bulletin, 984 (1952).
[24]376 US 398 (1964); 35 *I.L.R.* 2.
[25]35 *I.L.R.* 110.
[26]In the former case, the United States Supreme Court first indicated that the concept of immunity was related to international constitutional balances. Then the Court declared that "the judicial branch would not examine the validity of a taking of property within its own territory by a foreign sovereign government, irrespective of the legality in international law of that action". In the latter case, without the "suggestions" from the State Department, jurisdiction was exercised by the court over a branch of the Spanish Ministry of Commerce, since the chartering of a ship to transport wheat was not strictly a political or public act.
[27]For instance, the law governing the capacity of the parties, for example, domicile or natural person or non-natural person, for example, state entities are not allowed to go to arbitration.

law applicable to the arbitration proceedings (often called the curial law or the *lex arbitri*) and, finally, (d) the conflict of law rules applicable to select each of these laws mentioned above.

The term "procedural law", used in this thesis, means the law regulating the arbitration proceedings and includes arbitrability, the validity of the arbitration agreement, the jurisdiction, appointment, removal, replacement and challenge of the arbitrators, time limits, rules of discovery, interim measures, form of arbitral awards and so on. Procedural law is also called the *lex arbitri*, the law governing the arbitration procedures. For the sake of consistency, the term "procedural law" will be used throughout this work.

In this thesis, "choice of law rules" refers to the rules providing judges or arbitrators with guidance to determine the law governing the substantive issues. This branch of the law can be referred to as "international private law", "private international law" or "conflict of law rules". However, in this work, unless stated otherwise, the term "choice of law rules" will be used to refer to these rules.

In addition, in this work, the expression "proper law" will only be applied to the law governing the substantive issues arising from the main contract between the parties. In contrast, the issues concerning the substantive law governing the parties' arbitration agreement will not be included. The term "proper law" is sometimes referred to as the law applicable to the substantive issues, or the substantive law, or the governing law, or the applicable law of the contract. Unless stated otherwise, the term "proper law" will be used to represent the law governing the substantive issues, which include the

interpretation and validity of the main contract, the rights and obligations of the parties, the mode of performance and the consequences of breach of the contract.[28]

1.2.4 A-national principles

In this thesis, the expression of "a-national principles" includes the general principles of law, the new *lex mercatoria* and amiable composition

The general principles of law

In international commercial arbitration, "general principles of law" are often chosen as the proper law of a state contract. These principles are defined in Article 38(1)(c) of the Statute of the International Court of Justice[29] as part of international law and which are recognised by civilised nations.

The new lex mercatoria

The expression the "new *lex mercatoria*", in this work, will be used to represent a system of law which is based on trade usages to regulate international commercial transactions. Various terms have been used to represent the same idea. They include the law merchant, the *lex mercatoria*, transnational law, the international law of contracts, international *lex mercatoria* and international trade law. However, in this work, unless quoted or stated otherwise, the term "new *lex mercatoria*" will be used in order to avoid confusion with the *lex mercatoria* developed during the medieval times.

Amiable composition or ex aequo et bono

---

[28]Lord Radcliffe in *Kahler v. Midland Bank Ltd.* [1950] AC 24, 56. It is also discussed in Redfern & Hunter, (1991), at p. 96.

[29]It will be referred to as the "ICJ" in this thesis.

Instead of applying law, arbitrators sometimes are required to decide the merits of the dispute on the basis of equity and fairness. Such an equity clause appears in the choice of law clause in different ways, such as directing the arbitrators to decide the case "according to equity or good conscience", or "as *amiable compositeurs*", or "*ex aequo et bono*". These terms represent different meanings; nevertheless, the difference is very slight. As mentioned above, the difference is infrequently made in most legal literature, arbitration rules and arbitration laws. In legal materials, these terms are generally used interchangeably. Under these circumstances, in this work, mainly the term "amiable composition" will be use to represent the idea of arbitrator's power to decide the issues in equity, rather than in law.

1.3 The scope of the research

First of all, this study is limited to the scope of international commercial arbitration as defined in the previous section. Secondly, among the vast number of issues that could be considered in a study on international commercial arbitration, this thesis concentrates on the issue of the application of a-national principles as the proper law of the contract and its influence on arbitral tribunals and national courts and on the contradiction between practice and theory on this subject. Many other important aspects on choice of law have had to be left out: for example, the procedural laws, and the substantive law governing the arbitration agreement.

Finally, this thesis proceeds on the arbitrator's decision based on a-national principles against national practices. With so many countries in the world, the study will be confined to six countries across different continents, namely, France, the United States, England, Hong Kong, China and Taiwan, in order to study the influence of the

application of a-national principles over countries situated in the different regions of the globe.

1.4 The object of this study

The object of this study is to show the different attitudes towards the application of a-national principles in international commercial arbitration held by arbitrators and national courts in different countries, and the contradictions between practice and theory. This thesis will examine the relationship between arbitration and national courts on the subject of the application of a-national principles as the proper law of the contract, and the control exercised by national courts over the awards made on the basis of a-national principles.

The research will also bring together sources from a variety of jurisdictions that will aid the understanding of the complex relationship between the arbitration industry and the domestic legal systems in different regions. In addition, the choice of England, France, the United States, Hong Kong, China, and Taiwan, as the domestic jurisdictions to be reviewed has been made on the basis of their different levels of development on this subject.

After presenting the conflicts between arbitration practice and national courts, there will be an examination of whether the existing theories of arbitration, namely, the jurisdictional, contractual, hybrid and autonomous theories, can justify the application of a-national principles. If not, efforts will be made to find a more logical approach to illustrate the present arbitration framework. The new approach may enable us to place

the topic of a-national principles in the wider framework of international commercial arbitration that is becoming increasingly accepted.

1.5 The methodology

The research on this thesis has been conducted on the basis of a combination of comparative studies and regional studies. First of all, the study of primary sources involved the examination of arbitral awards, particularly the ICC awards, and the domestic case law and arbitration laws of different jurisdictions. The contradictions between the practice of arbitration and the different approaches of national courts will be given. Furthermore, a comparative study was conducted on a regional basis. That is, a comparison was made of the approaches of the countries which have a more advanced arbitration system to those of the countries which are less familiar with arbitration. In addition, focus will also be brought to the issue of whether the European borne a-national principles have received a universal acceptance in other continents. Finally, a comparatively logical approach for the present arbitration framework will be developed through the examination of the existing theoretical structure of international commercial arbitration.

1.6 The structure of the thesis

This thesis is divided into four parts containing twelve chapters. The first part will discuss both traditional and modern choice of the proper law rules and the influence of the delocalisation theory on the development of the choice of a-national principles. In the second part, based on some *ad hoc* and ICC arbitral awards, the examination will focus on the wide application of a-national principles as the proper law of the contracts

in international commercial arbitration. Recognising the wide application of a-national principles in international arbitral awards, the third part of this study will investigate the attitudes of English, French, the United States, Hong Kong, Chinese and Taiwanese courts towards the application of a-national principles in arbitration. After examining the contradictions of the practice of arbitration and the national courts, the final part will investigate whether a more logical approach to illustrate the issue of a-national principles in the present arbitration framework can be discovered.

The research carried out in this thesis is arranged in twelve chapters. They are as follows:

Chapter One	Introduction
PART ONE	**The traditional and modern trends in choice of the proper law rules**
Chapter Two	The choice of the proper law rules
Chapter Three	The modern trend in the choice of the proper law
PART TWO	**The application of a-national principles as the proper law of contracts in international commercial arbitration**
Chapter Four	The application of the general principles of law as the proper law of the contract in international commercial arbitration
Chapter Five	The application of the new *lex mercatoria* as the proper law of the contract in international commercial arbitration

Chapter Six The application of amiable composition as the proper law of the contract in international commercial arbitration

PART THREE **The Attitudes of national courts towards the arbitral awards made on the basis of a-national principles - a study on the decisions of the English, French, American, Hong Kong, Chinese and Taiwanese courts**

Chapter Seven Whether the English courts accept the application of a-national principles in international commercial arbitral awards

Chapter Eight Whether the French courts accept the application of a-national principles in international commercial arbitral awards

Chapter Nine Whether the United States courts accept the application of a-national principles in international commercial arbitral awards

Chapter Ten Whether the Hong Kong, Chinese and Taiwanese courts accept the application of a-national principles in international commercial arbitral awards

PART FOUR **Finding a more appropriate approach to interpret the application of a-national principles**

Chapter Eleven A study of the nature of international commercial arbitration and an evaluation of the theories

Chapter Twelve Summary and development

PART ONE

The Traditional and Modern Trends in Choice of the Proper Law

Introduction to Part One

Before examining the application of a-national principles in international commercial arbitration and the levels of acceptance of such practice in different jurisdictions, it is necessary to provide a background study concerning both the traditional and modern trends in choice of the proper law of the contracts. Part One contains two chapters. Chapter Two provides a general picture of the choice of law rules traditionally applied by international arbitrators in deciding the proper law of the contracts, in which the rise and fall of three-step choice of law procedure will be discussed. With the change in the traditional choice of law rules emerges a trend in choosing a-national principles as the proper law. This change will be outlined in Chapter Three by means of a discussion about the interactions between the application of a-national principles and the delocalisation theory in the context of international commercial arbitration.

Chapter Two

Choice of the proper law rules

This chapter contains a discussion of the choice of law rules conventionally used by arbitrators to decide which law is the proper law of the contract. A three-step procedure of this choice of law process will be discussed. The first part of the discussion will concentrate on the subject of party autonomy in choice of the proper law. Later, the cases where the parties failed to specify the proper law will be investigated in the second and third parts of the discussion. In these two parts, the relationship between the "implied choice" test (the "subjective test") and the "closest and most real relationship" test (the "objective test") will be discussed. Finally, the issue of whether the choice of law rules provide the arbitrators with a clear guideline in the decision-making process will be addressed.

2.1 Background study: the importance of choice of the proper law in international commercial arbitration

Before examining the issues arising from choosing the proper law of the contract in international commercial arbitration, it is necessary to stress the significance of the choice of the proper law procedures. The importance of this issue can be analysed from three aspects: the advantages of international commercial arbitration; the expectations of the parties; and the arbitrator's point of view.

Firstly, the importance of the choice of proper law will be discussed from the aspect of the advantages of international commercial arbitration. As most authors[1] have agreed, compared to national court proceedings, international commercial arbitration is a more

[1] For example, Rowland, *Arbitration Law and Practice*, (1988), at pp. 16, 19.

flexible and speedy way to resolve international commercial disputes. To safeguard its reputation of speed and flexibility, this mechanism offers the parties quite a large degree of freedom in deciding how the arbitration procedures shall be conducted.

Although flexibility and speed are the main advantages of international commercial arbitration, it does not mean that the arbitrator can decide the rights and obligations of the parties without following any rules. Similar to judges in the national courts, the arbitrators decide the merits of the disputes according to the rules of law, either specified by the parties or decided by the arbitrators themselves. However, in the cases where no proper law of the contract is expressed by the parties or the choice is invalid, the arbitrators have to spend some extra time choosing the proper law from an examination of a large number of factors, such as the nationalities of the parties, the subject matter of the contract, the place of performance, the place of contracting, the form of the contract, the language used and the terms of the arbitration agreement. Apart from the fact that arbitrators have to spend extra time to decide the proper law, the arbitration procedures can be delayed to a great extent if the parties object to the choice made by the arbitrators and resort to court proceedings. As a result, the aim of providing a speedy service through international commercial arbitration may not be achieved under such circumstances.

Secondly, the parties' expectations can be another indication to illustrate the importance of the issue of the choice of the proper law. Apart from expecting to settle the disputes as soon as possible, the parties may also want to predict the outcome of the arbitration. Such expectations may be more easily achieved if a valid choice of the proper law has been made by the parties themselves. In particular, by doing this the parties will have the advantage of knowing where they stand and what rights and obligations they have by choosing the proper law of the contract themselves.

Finally, the choice of the proper law has a critical importance at the stage of recognition or enforcement of the arbitral awards. An award made by arbitrators who failed to observe or respect the parties' express choice of law not only can be successfully challenged by the losing party but also most national courts will refuse to enforce such an award. As provided by Article V(1)(d) of the New York Convention, recognition and enforcement of the award may be refused if "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." Therefore, unless contradicted by other mandatory provisions or public policy, an award made on the basis of the proper law chosen by the parties will be enforced in most national courts. However, in the case where no proper law is chosen by the parties, the losing party may challenge the arbitrator's decisions on the choice of the proper law. This may possibly result in a further delay of the recognition or enforcement of arbitral awards, or, moreover, doubts in the validity of the awards if the court believes that the arbitrator's decision on the choice of proper law cannot be justified.

To sum up, no matter whether the proper law is specified by the parties or decided by the arbitrators, the proper law has a great deal of importance in relation to the arbitration procedures and the validity of arbitral awards. Only by ascertaining the proper law of the contract can the disputes be properly decided and the award be properly carried into effect.

2.2 Choice of the proper law of the contract in international commercial arbitration

As agreed by most commentators, when compared with proceedings conducted in the national courts the most significant feature of international commercial arbitration is that a great deal of autonomy is enjoyed by the parties. In accordance with such

autonomy, the parties are free to have their disputes governed by any law they desire. However, from time to time, parties fail to exercise such powers properly. As a result, this is frequently where the controversy starts.

After disputes are submitted to the arbitrators, it is the arbitrator's duty to find the proper law of the contract in order to settle the disputes. Nevertheless, during the arbitral procedures, choosing the proper law of the contract is not as easy a task as it appears to be. Traditionally, a three-step procedure has been introduced to resolve this problem. Firstly, arbitrators have to check on the choice of law clause in order to find out whether a valid choice of the proper law has been expressly set out in the contract or the arbitration agreement. If it is, in accordance with the doctrine of party autonomy, the arbitrators are obliged to apply the expressed choice of the proper law to resolve the disputes referred to them.

Usually, the parties to an arbitration do specify the proper law in the contract or the arbitration agreement (which might be a specific national law, the incorporation of some provisions of any national system of law, or even the a-national principles). Nevertheless, sometimes, such choice is invalid by reference to the mandatory rules or public policy; alternatively, no such choice might be expressed in the contract or the arbitration agreement. This may be because the importance of choice of law has been ignored by the parties or no agreement has been reached between the parties. Under these circumstances, traditionally, the arbitrators will have to follow the second step - the implied choice of law test - to find an implied proper law of the contract from the relevant circumstances of the case. In some complicated cases, it is possible that arbitrators fail to find the proper law under the first and second steps. If this is the case, at this stage, arbitrators will have to apply the closest and most real relationship test to choose the proper law of the contract they deem appropriate from the objective circumstances.

In the second section of this chapter, the three-step procedures concerning the choice of the proper law will be discussed. Firstly, the development of party autonomy as it relates to the choice of the proper law of the contract and the power enjoyed by the parties to specify the proper law of the contract will be examined. Secondly, in the absence of an express choice of the proper law from the parties, both the "implied choice" test (the inferred choice test) and the "closest and most real relationship" test which provide arbitrators with a guideline in determining the proper law of the contract will be illustrated.

2.2.1 The proper law expressly chosen by the parties

The parties' freedom to have their disputes governed by the law they desire is based on the theory of party autonomy. In fact, most international commercial contracts do contain an express choice of the proper law in order to avoid the application of a law unfavourable to the party (or the parties) since "The determination of the proper law of the contract will not involve any difficulty if the parties have been wise enough to record expressly which legal system is to apply to their agreement."[2] After the arbitration being initiated, in accordance with the first step of the choice of law rules, arbitrators have to look to the choice of law clause to find the proper law of the contract in order to decide the merits of the disputes.

Party autonomy in choice of law - freedom of contract

Within certain limitations, the parties' freedom in choosing the proper law of the contract is well recognised in international commercial arbitration cases. As Rabel states: "The practice of allowing parties to determine the law applicable to their contractual relations ... for centuries has been applied by courts throughout the world

[2]Schmitthoff, *The English Conflict of Laws*, at p. 109.

with slight dissent."[3] Once their intention is found, it is compulsory for the arbitrators to apply this choice of law in order to decide the substantive issues arising from the main contract between the parties. This freedom is based on the doctrine of party autonomy, which is originated from the idea of 'freedom of contract' (it is also called the "classical contract theory" or the "will theory").

Freedom of contract, in the United Kingdom, originated in the eighteenth century. At that time, the individual was granted the maximum freedom to pursue his objectives and an inalienable right to enter into contracts for his own benefit. Later on, in the early nineteenth century, the philosophy of *laissez-faire*, that is, the doctrine invoking unrestricted freedom in commerce, flourished and similarly indicated that the law should interfere with people as little as possible.[4] As Cohen observes in *The Basis of Contract*[5]:

> "Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least."[6]

Following this idea, considering the nature of contracts, the will of the parties is regarded as the most significant concept in the classical contract theory. Rights and obligations can only arise from the fact of an agreement or an exchange of promises or wills between the parties. By the middle of the nineteenth century, the classical contract theory had taken root in English law through the acceptance that an obligation was created by a communication of wills.[7]

---

[3]Rabel, *Comparative Conflicts*, Vol. I (2nd ed. 1958), at p. 90. Also see Lew, *The Applicable Law in International Commercial Arbitration*, (1978) at p. 71 (hereinafter Lew, *Applicable Law*).
[4]Atiyah, *An Introduction to the Law of Contract*, (3rd ed. 1989), at p. 7.
[5]Cohen, "The Basis of Contract" 46 *Harv.L.R.* (1933) at p. 553.
[6]*Ibid.* at p. 558.
[7]Atiyah, *The Rise and Fall of Freedom of Contract*, (1979), at p. 407.

Nevertheless, the absolute freedom of contract enjoyed by the parties throughout the eighteenth and part of the nineteenth centuries suffered a setback by the end of nineteenth century. In addition, the classical principle of *laissez-faire* was challenged because of the changes in the social and economic environments. Professor Atiyah regarded the classical contract theory as a failure, and argued that "... in the modern world, where many people see the functions of Government and Parliament as virtually limitless, it is absurd to think of society as regulated by freedom of contract subject only to limited instances of State 'interference'."[8]

Following the economic and social changes since the nineteenth century, the classical contract theory no longer accords with the modern world in many respects. For instance, the classical concept of freedom of contract takes little account of social and economic pressures which might virtually force a man to enter into a contract which is obviously unfair to him. In addition, the classical concept of freedom of contract ignores the possible inequalities of the bargaining powers between the contracting parties. Literally, the classical contract theory can only be supported if the bargaining powers of both contracting parties are equal; however, this is not always the case in reality. Considering the criticisms mentioned above and the possible involvement of third parties, the issues of monopolies, restrictive agreements, consumer protection, and compensation for the workmen, freedom of contract is more restricted than it was previously claimed to be.

Party autonomy in choosing the proper law in international commercial arbitration[9]

---

[8] *Ibid.* at p. 693.

[9] One point which needs to be stressed is the inapplicability of the Convention on the Law Applicable to Contractual Obligations (The Rome Convention) to the issue of the choice of the law in international commercial arbitration. In 1990, the United Kingdom Government ratified the Convention dated June 19, 1980 on the Law Applicable to Contractual Obligations (The Rome Convention), which has been incorporated in the law of the United Kingdom by the Contracts (Applicable Law) Act 1990. (This incorporation is subject to two reservations. One is Art. 7(1) in relation to the provision of mandatory rules. The other one is Art. 10(1)(e) in relation to the consequences of nullity of the contract.) The Rome Convention is designed to provide clear rules to determine the applicable law of the contract. Since then, most parts of the common law rules

The theory of the freedom of contract also has some effect on the mechanism of international commercial arbitration. Based on the idea of freedom of contract, the theory of party autonomy is invoked as the basis of international commercial arbitration. Based on such autonomy, the parties have a cardinal right to choose the proper law to govern the main contract. This theory is not only recognised in the academic studies, but also contained in the international conventions, the institutional arbitration rules and the different national arbitration statutes.

For instance, in Article 33(1) of the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Arbitration Rules"), the arbitral tribunal is required to apply "the law designated by the parties as applicable to the substance of the dispute."[10] More directly than the UNCITRAL Arbitration Rules, The International Chamber of Commerce Rules of Conciliation and Arbitration of 1988 (the "ICC Rules") explicitly offer the parties the freedom "to determine the law to be applied by the arbitrator to the merits of the dispute."[11] A similar stipulation also appears in the Rules of the London Court of International Arbitration ("LCIA").[12] A similar arbitration rule also appears in another continent: the International Arbitration Rules of the American Arbitration Association ("AAA") has the stipulation which demands that "the tribunal shall apply the substantive law or laws designated by the parties as applicable to the dispute."[13]

---

concerning choice of the proper law have been superseded by the Rome Convention. The question is whether the arbitration agreement also falls into the scope of this Act. As far as the scope of application of the Rome Convention is concerned, Art 1(2),(3) and (4) provide that the Convention does not apply to a significant number of designated contractual obligations, for example, those relating to wills, succession and matrimonial property. (Article 2 (b) of the Rome Convention) Also, some matters which were not regarded as "contractual obligations", such as arbitration agreements, agreements on the choice of court (Article 1(2)(d)) and certain obligations arising from negotiable instruments (Article 1 (2)(c)) are excluded from the convention. Generally, matters which are not contractual, though they arise in a contractual context, are not covered by this convention. (Article 1(2)(a)-(h)] However, as far as the proper law of the contract in arbitration is concerned, if the main contract belongs to the category of contractual obligations, the arbitral tribunal has to apply the rules in the Rome Convention to decide the applicable law of the main contract.

[10]Article 33(1) of the UNCITRAL Arbitration Rules, which were adopted on April 28, 1976.

[11]Article 13(3) of the Rules of Arbitration of the International Chamber of Commerce.

[12]Article 13(1)(a) of the Rules of the London Court of International Arbitration.

[13]Article 29 of the International Arbitration Rules of American Arbitration Association.

As discussed above, most legal systems recognise the parties' freedom to express their intention that the law of a given country shall govern the contract. This intention will direct the arbitrators to apply the chosen law to settle the dispute between the parties. Taking England[14] and Scotland[15] as examples, freedom of contract has been applied in the various cases concerning the issue of the choice of the proper law. For instance, the case of *R v. International Trustee for the Protection of Bondholders*,[16] pointed out that the proper law of the contract is the law which the parties intended to apply. Moreover, the choice "will be ascertained by the intention expressed in the contract if any, which will be conclusive."[17] This autonomy again is confirmed by a leading case.[18] In the case of *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, the court upheld the parties' express choice of law and indicated that "It is now well settled that by English law the proper law of contract "is the law" which the parties intended to apply. The intention to apply a specific national law as the proper law is objectively ascertained."[19]

Several decades later, the parties' freedom in choosing the proper law of the contract was again upheld in the case of *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners*[20] In this case, Lord Reid set out that:

> "The general principle is not in doubt. Parties are entitled to agree what is to be the proper law of the contract, and if they do not make any such agreement then the law will determine what is the proper law. There have been from time

---

[14]Collins, (ed.) *Dicey and Morris on the Conflict of Laws*, (12th ed. 1993) at p. 1211 (hereinafter *Dicey and Morris*). In England and Scotland, in relation to the choice of the proper law, the uniform rules of Articles 3 and 4 of the Rome Convention will replace the common law rules in cases where the Convention applies. Accordingly, the general conclusion of these articles is strikingly similar in effect to the position reached by the common law, therefore, the choice of proper law rules discussed in this chapter will be conducted in general terms to illustrate the underlying issues: first, on the basis of the common law rules, secondly, from the viewpoint of the Rome Convention.

[15]Anton, *Private International Law- A Treatise from the Standpoint of Scots Law*, (2nd ed. 1990) at p. 263 (hereinafter Anton, *Private International Law*).

[16][1937] AC 500.

[17]*Ibid.* at p. 529.

[18]*Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277.

[19]*Ibid.* at p. 289.

[20][1970] AC 583.

> to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled. But it must be a contractual agreement. It need not be in express words. Like any other agreement it may be inferred from reading their contract as a whole in light of relevant circumstances known to both parties when they made their contract."[21]

Party autonomy is widely accepted by most jurisdictions; for instance, arbitrators are required to decide the dispute according to the rules of law chosen by the parties under the French Code of Civil Procedure.[22] This freedom in choosing the proper law is also upheld in § 1-105(1) of the *Uniform Commercial Code* ("U.C.C."). Similar provisions can be observed in section 46(1) of the English Arbitration Act 1996,[23] Article 145 of the Chinese Civil Code[24] and Article 5 of the Chinese Foreign Economic Contract Law.[25]

Nevertheless, the issue of whether it is proper to offer the parties such freedom to choose the proper law was raised.[26] In England, a negative attitude towards total freedom was held by a group of scholars and judges. Lord Denning was a member of this school of thought. He stated that the choice made by the parties did not have an absolute effect on the arbitrators. Furthermore, he indicated that: "parties are free to stipulate by what law the validity of the contract is to be determined. Their intention is only one of the factors to be taken into account."[27]

Nevertheless, this decision was reversed by Lord Denning himself in *Tzortzis* case where he contended that the parties' express choice would be "conclusive" in absence

---

[21] *Ibid.* at p. 603.
[22] Article 1496 (1) of the French Code of Civil Procedure.
[23] Section 46(1) provides that: "The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute."
[24] It provides: "Except where the law provides otherwise, the parties to a contract involving foreign interests may choose the law applicable to the resolution of their contractual disputes."
[25] It provides: "The parties to a contract may choose the law to be applied to the settlement of the dispute arising from the contract."
[26] *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] AC 583, 603.
[27] *Boissevain v. Weil* [1949] 1 KB 482, 490-491.

of some public policy to the contrary.[28] More support was shown in the later case of *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.*.[29]

Is connection necessary?

While the idea of the absoluteness of the freedom in choice of the proper law was challenged, the main issue behind this debate was whether the parties have a right to choose a law which does not have any connection with the case. In some jurisdictions,[30] the conflict of law rules require that the substantive law chosen by the parties must bear some "reasonable relationship" to their transaction. This is to prevent the parties from taking advantage of the freedom by choosing a law which does not have any connection with the case, in order to evade a possible disadvantageous situation which would have arisen by choosing a law bearing a reasonable relationship to the transaction.

In fact, some important factors may have been ignored in the suggestion that evasion of the mandatory rules or disadvantageous situations is the only reason why the parties choose a law bearing no connection to the transaction. Such an inference may reflect part of the truth; however it is not always the case. The reason for the parties choosing a law bearing no connection to the transaction may be caused by the fact that the parties or their legal advisors know this legal system better than others; alternatively, the arbitrator's background may lead the parties to choose the national law which he appreciates most. More often, choosing a law having a good reputation in a certain legal field can also be another valid justification for the parties' choice. For instance, London has been famous as a centre for the maritime industry for some time;

---

[28] *Tzortzis v. Monark Line A/B* [1968] 1 WLR 406, 411.

[29] *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] AC 583, 603.

[30] Under section 187 of the *Restatement (Second) Conflict of Laws*, the parties' chosen law must be applied unless, among other things, "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice "section 1-105 (1) of the *UCC* imposes the same sort of "reasonable relation" requirement. At common law, some New York courts applied a reasonable relationship requirement fairly strictly; see *A.S. Rampell, Inc. v. Hyster Co.* 165 N.Y. 2d 475 (1957).

therefore, English law might be chosen as the proper law of the contract even though so many commercial transactions have nothing to do with England.[31]

Moreover, neutrality may be another reason for such a choice. In practice, it is very common for the parties to state contracts to choose a law which has no connection with the transaction, since neither party wants to have the contract governed by the national law of the other party's country. From the viewpoint of a state or a state entity, unfamiliarity with foreign laws and the dignity of the states themselves frequently deter them from having the contracts subjected to the law of other countries.[32] On the other hand, with the fear of potential bias or injustice in the national courts of both parties, the parties to this kind of contract not only prefer to submit the disputes to international commercial arbitration in a neutral country, but also choose a neutral law to be the governing law of the contract.

As the English courts stated: "Connection with English law is not as a matter of principle essential,"[33] therefore, it does not seem to be appropriate to deny the parties' freedom to choose a law unconnected to the transaction. This statement is supported by Lord Wright[34] and Lord Diplock in *Amin Rasheed* case[35] where he said:

> "It is apparent from the terms of the contract itself that the parties intended it to be interpreted by reference to a particular system of law, their intention will prevail and the latter questions as to the system of law with which, in the view of the court, the transaction to which the contract relates would, but for such intention of the parties, have had the closest and most real connection, does not arise."[36]

---

[31] *Vita Food Products v. Unus Shipping Company* [1939] AC 277, per Lord Wright at p. 290.
[32] For instance, the Indian and Pakistan governments will not offer contracts to foreign contractors unless they agree that the substantive law of the contract is the law of India or Pakistan.
[33] *Vita Food Products v. Unus Shipping Company* [1939] AC 277, per Lord Wright at p. 290.
[34] *Ibid.* at p. 290.
[35] *Amin Rasheed Shipping Corporation; Al Watab, The v. Kuwait Insurance Co.* [1984] AC 50.
[36] *Ibid.* at p. 61.

While some states[37] still require that the choice of the proper law must have reasonable connections with the transaction[38], in the state of New York the courts have abandoned the reasonable relationship test - during the 1980s, a choice of law statute designed to eliminate such a requirement was enacted in the state of New York. According to this statute, no connection was required when the parties selected New York law as the proper law.[39]

This is also recognised in some of the ICC Awards. In one, a dispute arose from a contract for the sale of potatoes between a Mozambique purchaser and a Dutch seller.[40] In the contract, the parties were required to submit the dispute to an arbitration which would be conducted in accordance with the arbitration rules of International Chamber of Commerce. The law applicable was stated to be "that known in England". The parties disputed the meaning and effect of the above quoted clause. The arbitrator[41] decided that the proper law was English law, even though it did not have any connection with the case; he said:

> "The parties had valid reasons to refer to the substantive law known in England. English law is neutral; its provisions are adapted to the needs of international commerce; it is fairly well accessible and known to lawyers of other countries, such as Switzerland, Mozambique and the Netherlands; ... Although somewhat unusual, the expression "the law known in England" is not ambiguous. It is wide enough to include, as appropriate, international rules and usages recognised in England."[42]

Accordingly, in international commercial arbitration, the parties to state contracts or major international contracts often prefer to choose a law which has no connection with the transaction or the parties themselves. Amongst the different laws applied in

---

[37]*Re Helbert Wagg & Co. Ltd.* [1956] Ch. 323, 341. (The Court will not necessarily enforce a choice of law clause selecting a law which has no connection to the transaction); also, *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277.

[38]See footnote 26 about the section 187 of the *Restatement (Second) Conflict of Laws*.

[39]New York General Obligations Law section 5-1401.

[40]ICC case no. 5505 (1987) XIII *Y.B.C.A.* 110 (1988), at p. 116.

[41]Mr. G. Muller was the arbitrator in this case.

[42]ICC case no. 5505 (1987) XIII *Y.B.C.A.* 110 (1988), at p. 118.

international arbitral awards, it should be stated that not only national laws having no connection with the case are chosen, but also a-national principles[43] are frequently chosen as the proper law to govern the substantive issues arising from international commercial contracts.

Limitations on the parties' expressed choice of the proper law

As is widely accepted, neither the freedom of the parties[44] nor the arbitrators' discretion in deciding the proper law is unlimited.[45] The limitations imposed on the autonomy vary from country to country. Generally speaking, in relation to the choice of proper law, party autonomy is subject to the scrutiny of public policy and the mandatory rules of the relevant laws: the law governing the arbitration agreement, the law of the arbitral situs[46] or of the state where recognition or enforcement are sought.[47]

Almost every national conflict of law rules recognise that the claim of public policy can override the parties' decision on the choice of law. While some cases have been categorised as public policy exceptions which are capable of invalidating the proper law chosen by the parties, such as discrimination prohibitions[48], usury restrictions[49], fair competition protections,[50] constitutional guarantees[51], and protections for

---

[43]The application of a-national principles in international commercial arbitration will be discussed in latter chapters.

[44]According to Dr. Lew, the freedom in choosing the law applicable to the contract that is recognised in most, if not all, national systems of law, no matter whether common law, civil law or socialist legal systems. Lew, *Applicable Law*, (1978), at p. 75.

[45]For example, the mandatory rules and public policy of the forum under Art. 7 and Art. 16 of the Rome Convention.

[46]Article V(1)(d) of the New York Convention 1958.

[47]Article V(1)(b) of the New York Convention 1958.

[48]*Muschany v. United States* 324 US 49 (1945).

[49]*Whitaker v. Spiegel Inc.*, 623 P. 2d 1147 (Wash 1981).

[50]*Davis v. Jointless Fire Brick Co.* 300 F. 2d. 1 (9th Cir 1924); *Blalock v. Perfect Subscription Co.* 458 F. Supp. 123 (S.D. Ala., 1978).

[51]*Bachvhan v. India Abroad Pub., Inc.* 1992 WL 110403 (NY S.Ct. April 13 1992) cited in Born, *International Commercial Arbitration in the United States*, (1994), at p. 138.

economically inferior parties,[52] it is still impossible to provide a complete list of public policy rules without detailed comparative research.

In addition, apart from public policy being a possible ground for invalidating the parties' choice of law, the application of mandatory rules of the otherwise applicable laws can be another way to derogate from the parties' choice.[53] In other words, the arbitrators are not obliged to apply the provisions of a particular foreign law chosen by the parties as the proper law when these provisions contradict the mandatory rules or public policy of the states which have a close connection with the transaction. This is stated in Article 7(1) of the Rome Convention,[54] which provides: "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract."[55]

As well as in international conventions, the exceptions of public policy and mandatory rules can be seen in most national laws. For instance, the English case law pronounces that the validity of the choice of a foreign law may be affected by the public policy and the mandatory rules of the forum.[56] In a leading case, Lord Wright stated that, unless the ground of public policy had been successfully avoided, the parties' express choice of the proper law would not be effective.[57] Lord McNair upheld this idea and stated that public policy is one of the restrictions on party autonomy in relation to the choice of proper law, while he said: "It is often said that

---

[52]*New York Life Ins. Co. v. Cravens* 178 US 389 (1900).
[53]See Article 3(3) of the Rome Convention.
[54]Articles 3 and 7 of the Rome Convention.
[55]Despite the non-application of Article 7(1) of the Convention, it is suggested that the English court could still apply this rule, either as a mandatory rule of the forum under Article 7(2) or as a rule of English public policy by virtue of Article 16. See the commentary on Article 7(1) in the Current Law Statutes of the Contract (Applicable Law) Act 1990, at p. 36-30.
[56]Collins, *Dicey and Morris on the Conflict of Laws*, (12th ed. 1993), at pp. 1239-1248.
[57]*Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277.

the parties to a contract make their own law, and it is, of course, true that, subject to the rules of public policy and *ordre public*, the parties are free to agree upon such terms as they may choose."[58]

A similar provision can also be seen in both the United States statutes[59] and court decisions. As the *Restatement (2d) of Conflict of Laws* (the "*Restatement*") illustrates:

> "The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless ... the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice-of-law by the parties."[60]

However, the restrictions which may be imposed by the mandatory rules of the *lex fori* have been strongly criticised by the proponents of the "delocalisation theory" which proposes a complete detachment between the *lex fori* and arbitration proceedings. The debate concerning how the delocalisation theory affects the choice of the proper law will be discussed in Chapter Three.

In relation to the restrictions of public policy on the parties' freedom in choosing the proper law of the contract, they have also caused concerns in international commercial arbitration. Some commentators have expressed their worries on this aspect on the ground that "public policy is an unruly horse that carries one to unforeseen destinations."[61] They claim that domestic public policy should not restrict party autonomy on the choice of law in international commercial arbitration. They maintain that international commercial arbitration should be subject to public policy applied

---

[58]Lord McNair, "The General Principles of Laws Recognised by Civilised Nations", (1957) 33 *Brit.Yrbk.Intl.L.*, at p. 278.
[59]Section 187 of *The Restatement (Second) Conflict of Laws* (1971).
[60]Section 187(2)(b) of *The Restatement (Second) Conflict of Laws* (1971).
[61]Katzenbach, "Conflicts on An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law", 65 *Yale L.R.* 1087 (1956).

universally, that is, international public policy. However, critics react differently towards this idea. While some states are sceptical about the role and scope of international public policy, some major international trade states, such as France and Belgium, have gone a step further and adopted international public policy. The same movement also influences the United States courts and they have adopted a more liberal and modern view on the issue of public policy.[62] Due to the different criteria applied in different jurisdictions, the role that public policy or international public policy has played in international commercial arbitration is still controversial. To avoid exceeding the scope of this chapter, a detailed study will be carried out in later chapters.[63]

2.2.2 The second step -- The implied choice of law test

Although the parties' freedom of choice of the proper law is widely accepted, for a number of reasons mentioned above, the parties may fail to exercise this power. In the absence of an expressed choice of law, the arbitrators have the same duty as those of the judges in a national court to choose a proper law for the parties. Failing to find the parties' express choice, the arbitrators have to decide the proper law of the contract by inferring it from the terms and nature of the contract and the general circumstances of the case.

The implied choice of law test was upheld in the case of *Rossano v. Manufacturers Life Insurance Co.*,[64] where the court provided guidance on inferring the proper law of the contract when no expressed choice was made by the parties in their contract.

---

[62]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* 473 US 614 (1985); *Shearson/American Express, Inc. v. McMahon* 482 US 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477 (1989); *National R.P. Passenger Corp. v. Consolidated Rail Corp.*, 892 F. 2d. 1066 (D.C. Cir. 1990); *In the Matter of the Arbitration Between Trade & Transport, In/ v. Valero Refining Co.*, (1990) 5, *Int'l Arb.Rep.*

[63]See Part Three for a detailed discussion.

[64][1962] 2 All ER 214.

Accepting the implied choice of law test set out in the cases of *Re United Railways of the Havana and Regla Warehouses Ltd.*[65] and *Bonython v. Commonwealth of Australia*,[66] the courts indicated: "The parties not having expressly chosen the proper law or stated their intention in terms the court must act on the evidence before it and fix the presumed intentions of the parties as best it can."[67] A more specific explanation was provided in *Whitworth Street Estates (Manchester) Ltd. v. James Miller*,[68] in which Lord Reid said:

> "Two slightly different tests have been formulated: "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion (*Bonython Case [1951] AC 201, 209*) and "with what country has the transaction the closest and most real connection." (*In Re United Railway of Havana [1961] AC 1007; 1068*). It has become common merely to refer to the system of law but I think that the two tests must be combined for all are agreed that the place of performance is a relevant and may be the decisive factor, and it is only in a loose sense that the place of performance can be equated to the system of law prevailing there."[69]

Indications for the implied choice of law test

Place of performance

With the implied choice of law test, different criteria have been applied in different cases. Among these different criteria, the law of the place of performance (*lex loci solutionis)* has attracted a great deal of attention as the basis for inferring the proper law of the contract.[70] In the nineteenth century, the place of performance was regarded as a strong indication for a judge or an arbitrator to infer the proper law of the contract from the terms and nature of the contract and the general circumstances of the case.[71]

---

[65][1960] Ch. 52, 94.
[66][1951] AC 201.
[67][1962] 2 All ER 214, 219.
[68][1970] AC 583.
[69]*Ibid.* at pp. 603-604.
[70]*The Assunzione* [1954] AC 224, 240.
[71]*Fergusson v. Fyffe* (1841) 2 *Robinson 267*; *Williamson v. Taylor* (1845) 8 D 156. See also *Scottish Provident Institution v. Cohen & Co.* (1888) 16 R 112.

The significance of the place of performance may be based on the fact that it would be easier for the arbitrators and the judges to inspect the performance of the work from which the dispute arises. This idea is supported by a number of cases which conclude that the place of performance is a good indication to infer the proper law the parties intended. With respect to the cases where more than one place of performance is involved, the "primary place test" is applied. For instance, in the case of *Re United Railways of Havana*,[72] the judge decided that, where there are several places of performance, the law chosen is that of the country which the court finds to be the "primary" place.

Nevertheless, the predominance of the place of performance test was questioned by some judges. For instance, Bowen L.J. argued that the court will not normally be able to attach much significance to the place of performance if the parties have to perform their obligations in different countries, especially when the same quality and quantity of the construction works are carried out in the individual different countries.[73] Furthermore, the strength of the *lex loci solutionis* is not absolute, and must "give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction."[74] The reason why the place of performance has lost its importance in determining the proper law of the contract[75] may be the fast development of the modern facilities for travelling and communications, and the realisation that disputes may arise from any part of the contract, not just from the performance.

Other indications

---

[72]*Re United Railways of Havana, etc.*, [1961] AC 1007.
[73]*Jacobs v. Credit Lyonnais* (1884) 112 QBD 589 (CA), 600.
[74]*Ibid.*
[75]*N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay and Company Limited* [1927] AC 604.

Apart from the place of performance, the currency of a given country mentioned in the contract[76], the use of a particular language[77] or a specific legal term[78] and so on, may also give guidance to arbitrators inferring the proper law from the relevant circumstances of the case. Whereas, the use of a particular language in the contract has been rejected as a strong indication of choice of the proper law of the contract.[79] This has been illustrated in a number of cases where the language of English was used in the contracts. It was suggested that the parties, perhaps, would not mean to have their contract governed by English law simply because English was the language of the contract. The use of English language may simply be due to the fact that English is an international language which has been commonly used in international contracts. Therefore, in England, the courts will not regard the use of English in the contract as a strong indication of the proper law unless there is further connection with England.[80]

In relation to whether the use of a marine policy which is held in a particular country constitutes an implied choice of the proper law, a positive answer was offered by the English Court of Appeal. In *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.*,[81] the court was unanimous in reaching the conclusion that using a policy governed by the Marine Insurance Act 1906 implies English law as the governing law of the contract. The court believed that the interpretation of the policy would not be comprehensible without reference to the Marine Insurance Act 1906 and that constituted a strong indication of the implied proper law of the contract.

---

[76]*The Assunzione* [1954] P 150 (CA); *Re United Railways of Havana and Regla Warehouses Ltd.*, [1961] AC 1007; *Re Helbert Wagg & Co. Ltd.* [1956] Ch. 323; *N.V. Handel Maatschappij J. Smits v. English Exports (London) Ltd.* [1955] 2 Ll Rep 69, 72; 317, 323 (CA).
[77]*The Industrie* [1894] 58; *The Adriatic* [1931] 241; *The Njegos* [1936] 90, 101.
[78]*R. v. International Trustee etc.* [1937] AC 500.
[79]*The Metamorphosis* [1953] 1 WLR 543, 549.; *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.* [1971] AC 572, 583, 594.
[80]*Atlantic Underwriting Agencies v. Compagnia di Assicurazione di Milano SpA* [1979] 2 Ll Rep 240.
[81][1984] AC 50.

Furthermore, in this case, Lord Diplock firmly stated the importance of the localisation of the proper law of the contract. If you wish to ascertain the proper law of the contract you have "to identify a particular system of law as being that in accordance with which the parties to it intended a contact to be interpreted,"[82] or you have "to see whether the parties have by its express terms or by necessary implication from the language evinced a common intention as to the system of law by reference to which their mutual rights and obligations are to be ascertained."[83] As he said,

> "the purpose of entering into a contract being to create legal rights and obligations between the parties to it, interpretations of the contract involves determining what are the legal rights and obligations to which the words used in it give rise. This is not possible except by reference to the system of law by which the legal consequences that follow from the use of those words is to be ascertained;[84]

In addition,

> "contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations."[85]

Nevertheless, today, no single factor or element of the contract is conclusive for the judges or the arbitrators to infer the proper law of the contract. In other words, every factor must be evaluated together in order to decide the implied choice of the proper law.[86]

2.2.3 The third step - the closest and most real relationship test

---

[82] *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] AC 50, 61; [1983] 3 WLR 241 (HL) at 245.
[83] *Ibid.* at p. 62.
[84] *Ibid.* at p. 60.
[85] *Ibid.* at p. 65.
[86] *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.* [1971] AC 572.

In international commercial arbitration, the choice of law issue can be more complicated than the parties might have expected, especially when no expressed choice of law is found in the arbitration agreement, or the arbitrators experience difficulties in inferring the implied choice of law. In most international commercial arbitrations, the parties have different nationalities or have offices situated in different countries, and where the contractual obligations are performed in different countries. For instance, a typical international arbitration case might be as follows: a German national signed a construction contract with a company whose head office is in Japan; the construction was carried out in Egypt; the contract was made in Paris and the payment was in American dollars. Under these circumstances, if no express choice of law is made by the parties, to infer the parties' implied choice of law can be a very difficult task since no clear indications can be drawn from the contract.

Traditionally, in this kind of situation, arbitrators are expected to refer this issue to the conflict of laws rules of the arbitral situs; in most jurisdictions, the closest and most real relationship test will be applied. An objective scrutiny of every term of the contract, every detail affecting its formation and performance, and every fact of the case will be conducted in order to ascertain the proper law. This approach in arbitration has been adopted by some international conventions or treaties.[87] For instance, Article 4(1) of The European Convention on the Law Applicable to Contractual Obligations (the Rome Convention)[88] provides: "To the extent that the law

---

[87]Born stated in *International Commercial Arbitration in the United States*, (1994), at p. 101 that :

> "In practice, however, the New York Convention and most other multilateral agreements, seldom address the conflict of laws rules applicable to the substantive law governing arbitrable disputes.
>
> One exception to this is the 1961 European Convention on International Commercial Arbitration, which provides in article VII that the parties "shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute," and failing any agreement, that the dispute will be governed by the proper law under the rules of conflict that the arbitrators deem applicable."

Another exception is the International Convention for the Settlement of Disputes, Article 42 of which provides for the application of international law and the law of the host state.

[88]1981 Official Journal of the European Communities no. L266/1. The Rome Convention specifically excludes "arbitration agreements" from its coverage. Article 1 (2)(d) of the Convention

applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected."[89] Similar provisions also appear in the United Nations Convention on Contracts for the International Sale of Goods[90], Article 33 of the UNCITRAL Arbitration Rules, Article 13(3) of the ICC Rules and Article 29 of the AAA International Rules.

In accordance with the closest and most real relationship test, in international commercial arbitration the law of the place of arbitration used to be regarded as a significant indication for both the procedural law and the proper law of the contract. In relation to the proper law of contract, the significance of the place of arbitration was illustrated in a number of cases. For instance, in *Hamlyn v. Talisker Distillery*,[91] the proper law of the contract was held to be the law of the place of the arbitral situs, since the parties agreed that the arbitration should take place in this given country. Later, the case of *Tzortzis v. Monark Line A/B*[92] went further than *Hamlyn*. In this case, Sweden was the country where the contract for the sale of a ship by Swedish sellers to Greek buyers was made. The court decided that the proper law of the contract was English law, even though there was no connection with England at all. The only reason for this choice was that the City of London was the place of arbitration. In addition, in the case of *Norske Atlas Co. Ltd. v. London General Insurance Co. Ltd.*,[93] where a dispute arose from a reinsurance contract between the parties, MacKinnon J. said that the proper law of the contract was Norwegian law since arbitration was to be held in Norway.[94]

---

does apply, however, to the underlying contractual dispute that is the subject of the arbitration agreement.

[89]See ICC case no. 6379 (1990). However the Rome Convention imposes certain limitations on this issue.

[90]See ICC case no. 2930 (1982).

[91][1894] AC 202.

[92][1968] 1 WLR 406 (CA).

[93][1927] 2 Ll Rep 104.

[94]The reason for the application of Norwegian law was also to be found in the fact that the arbitrators' meeting place was Christiania.

Similar to England, the United States courts also supported the idea that the parties' choice of the place of arbitration was a strong indication for the arbitrators to apply the substantive law of the arbitral situs to settle the disputes.[95] As Ehrenzweig states "It is widely held that the parties who have chosen a place of arbitration have thus impliedly agreed on the applicability of both the procedural and substantive law of that place"[96] This idea is also stated in the *Restatement*:[97]

> "Provision by the parties in a contract that arbitration shall take place in a certain state may provide some evidence of an intention on their part that the local law of this state should govern the contract as a whole. This is true not only because the provision shows that the parties had this particular state in mind, it is also true because the parties must presumably have recognised that arbitrators sitting in that state would have a natural tendency to apply its local law."

Moreover, in the case of *Scherk v. Albert-Culver Co.*,[98] the plaintiff, an American Corporation, purchased three interrelated business enterprises from the German defendant. As far as the issue of the proper law was concerned, Mr. Justice Stewart said: "Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction."[99]

Nevertheless, the traditional idea that supports the application of the arbitral situs's substantive rules has been under a serious attack in recent years. It has been criticised by some commentators[100] who believe that this idea is outdated. For instance, Dr.

---

[95]Section 218 comment b of the *Restatement (Second) Conflict of Laws* (1971).
[96]Ehrenzweig, *Conflict of Laws*, (1962) at p. 540.
[97]Section 218 comment b of the *Restatement (Second) Conflict of Laws* (1971).
[98]417 US 506 (1974) 519, n. 13.
[99]*Splosna Plovba of Piran v. Agrelak Steamship Corp.* 381 F. Supp. 1368, 1370 (SDNY 1974); *In re Application of Doughboy Indus. Inc.* 233 NYS 2d 488 (1962); and, *Konkar Indomitable Corp. v. Fritzen Schiffsagentur und Bereederungs GmbH* 80 Civ. 3230 (SDNY) (1981), where "Selection of an arbitration forum may also be viewed as but one factor in determining a contract's 'centre of gravity' for choice of law purposes."
[100]e.g., Collins, "Arbitration Clauses and Forum Selection Clauses in the Conflict of Laws: Some Recent Developments in England", [1971] 2 *J.Mar.L. & Com.* 363; Kopelmanas, "The Settlement of Disputes in International Trade", 51 *Colum.L.R.* 384 [1961]; Lew, *Applicable Law*, (1978), at p.

Lew explains that of course it may be that "the parties will choose the arbitration forum and intend its law to apply; but then again that intention might equally not exist."[101] Other commentators even argue that the changes have been an almost total abandonment of the rules of the arbitral situs.[102] They also believe that it is a fallacy to compare a seat of an arbitration with a judicial forum, because "an arbitrator does not exercise public or constitutional power in the name of the State."[103]

The movement has been seen in the major international trade countries, such as the US and England. In England, the compulsory application of the substantive law of the place of arbitration was rejected by the House of Lords in the case of *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.*.[104] In this case, London was expressed as the place of arbitration in the arbitration clause. Rejecting the older case law, the House of Lords decided that French law was the proper law of the contract since the contract had no connection with any other system of law other than French law. In addition, Lord Wilberforce said: "An arbitration clause must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts."[105]

Since April 1, 1990, in the United Kingdom the common law rules concerning choice of law in contract have, to a large extent, been replaced by the rules in the EEC Convention on the Law Applicable to Contractual Obligations (the Rome Convention). The Rome Convention has been incorporated into the laws of the United Kingdom by

---

190, 204; Rubino-Sammartino, *International Arbitration Law*, (1990), at p. 256; *Dicey and Morris*, (12th ed. 1993) at p. 1183. and Born, *International Commercial Arbitration in the United States - Commentary & Materials*, (1994), at p. 111.

[101]Lew, *Applicable Law*, (1978), at p. 190, 204.

[102]Goldman, "La *Lex Mercatoria* dans les Contrats et L'arbitrage International", *Neth.Int'l.L.Rev.* 220 (1956) at p. 226; cited from Born, *International Commercial Arbitration in the United States - Commentary & Materials*, (1994), at p. 104.

[103]Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, (2d ed. 1990), at p. 285.

[104]*Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.* [1971] AC 572, 589, 597-598, 605-607.

[105]*Ibid.* at p. 600.

the Contracts (Applicable Law) Act 1990.[106] Although Article 1(2)(d) of the Rome Convention expressly excludes "arbitration agreements and agreements on the choice of courts" from its scope of application, the Convention still governs the choice of law in relation to the main contract. As Anton clearly points out:

> "... the arbitration agreement is excluded from the operation of the Convention and remains subject to the common law rules. ... This does not mean that an arbiter (or judge) is not bound to apply the rules of the Convention to the substantive issues of choice of law which may arise in the course of the arbitration or litigation. It merely means that issues relating to the validity, interpretation, and effect of the arbitration or choice of court agreement are not governed by the choice of law rules established by the Convention."[107]

In respect of the choice of law rules, the Rome Convention provides new rules to be followed by the judges and the arbitrators sitting in the United Kingdom. Article 3(1) confirms the principle of party autonomy and stipulates: "A contract shall be governed by the law chosen by the parties." The Rome Convention also allows the choice of a foreign law, as Article 3(3) provides that a choice of a foreign law, subject to the mandatory rules[108] and public policy,[109] must be accommodated by the courts of the Contracting States even if all the relevant elements are connected with one country only. This provision is further illustrated:

> "The law chosen need not in principle have any geographical or physical connection with the contract. This approach is in accord with the views expressed by the U.K. negotiators and reflects the practice of the common law. It also appears to be the case that the rules of the Convention are brought into play if the only foreign element in the case is the choice of foreign law to apply to what is otherwise an entirely domestic transaction."[110]

The implied choice of law test is also incorporated into the Rome Convention. As Article 3(1) provides: "The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." This provision

---

[106]The text of the Convention is set out in Schedule 1 to the Act.
[107]Anton, *Private International Law*, (2nd ed. 1990), at p. 360.
[108]Articles 3(3), 5(2), 6(1) and 7(2).
[109]Article 16.
[110]Scottish Current Law Statues, Chapter 36, at p. 19.

allows judges and arbitrators, taking all the facts into consideration, to decide that the parties have made a choice of law even if this is not expressly stated in the contract.[111] In addition, judges will follow the rules - the closest and most real relationship test, set out in Article 4 to determine the applicable law in cases where a choice of law has not been made, expressly or implicitly, in the contract itself within the meaning of Article 3 of the Rome Convention.[112]

2.3 Difficulties in distinguishing the test of implied choice and the closest and most real connection test

This chapter will be concluded by asking whether the choice of law rules provide arbitrators a clear guideline in the choice of law process? As far as the three steps of the choice of law rules are concerned, subject to the exceptions of public policy and mandatory rules, the first step to search for the parties' express choice of law is clearer than the other two steps. In the absence of the parties' express choice of law, the second and third steps of the conflict of laws rules are meant to provide the arbitrators with a basic guideline to decide the proper law of the contract. Nevertheless, in the opinion of the present writer, it is difficult to draw a line between the implied choice test and the closest and most real connection test.

Accordingly, under the implied choice of law test, the proper law of the contract can only be decided if this implied choice can be demonstrated with reasonable certainty from the terms of the contract or the circumstances of the case. Arbitrators, by putting themselves in the position of the parties, are required to look at this issue from the standings of the parties and try to infer which law the parties intended. As to the closest and most real relationship test, it claims to be a more objective test which

---

[111] Giuliano-Lagarde Report at p. 17.
[112] As set out in Article 4.

requires the arbitrators to "impute an intention or to determine for the parties what is the proper law, which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract."[113] Contrary to the implied choice of law test attempting to ascertain the intention of the parties, the arbitrators are meant to put themselves in the position of 'reasonable men' and determine the objective proper law of the contract.

However, while the outcome of the application of these twin tests are frequently the same, a question that has to be asked is whether "putting arbitrators into the parties' position", as required by the implied choice test, can be clearly distinguished from "putting arbitrators in the place of reasonable men", as required by the closest and most real relationship test?

In the *Whitworth* case,[114] Viscount Dilhorne expressly points out that the implied choice test and the most real and closest test are, in fact, two distinct stages by referring to the judgment of Widgery L.J. in the Court of Appeal[115] that:

> "To solve a problem such as arises in this case one looks first at the express terms of the contract to see whether that intention is there to be found. If it is not, then in my judgment the next step is to consider the conduct of the parties to see whether that conduct shows that a decision in regard to the proper law of the contract can be inferred from it. ... Finally, if one fails in this inquiry also and is driven to the conclusion that the parties never applied their minds to the question at all, then one has to go to the third stage and see what is the proper law of the contract by considering what system of law is the one with which the transaction has its closest and most real connection."[116]

Based on the observation of the present writer, nevertheless, the standings of the parties and a reasonable man are very similar since no matter which stand the arbitrators take, the selection of the applicable law must be decided on a reasonable

---

[113] *Mount Albert Borough Council* [1938] AC 224, (PC) 240.
[114] [1970] AC 583.
[115] *Whitworth Street Estates Ltd. v. James Miller* [1969] 1 WLR 377 (CA).
[116] Widegery L.J. in *Whitworth Street Estates Ltd. v. James Miller* [1969] 1 WLR 377 (CA), at p. 383, (CA); also quoted by Viscount Dilhorne in [1970] AC 583 (HL) at p. 611.

basis. Furthermore, under the implied choice test, the arbitrator's job is to ascertain the parties' intention; however this artificial certainty is also based on the nature of the case and general circumstances of the case, which is similar to the closest and most real relationship test. Therefore, the present writer would suggest that the rules for the arbitrators to find the proper law of the contract under these two tests are similar to each other. In other words, in certain aspects, they overlap.

If the implied choice of law test does overlap with the closest and most real relationship test, the question is whether it is essential for the arbitrators to follow these three stages to decide the proper law of the contract. If the answer is negative, the next question is whether it would be more sensible to apply the more objective test- the closest and real relationship test - to determine the proper law? Furthermore, it might be asked whether the implied choice of law test should be removed from the existing choice of law rules in international commercial arbitration?

In the opinion of the present writer, instead of guessing the parties' intention, the proper law should be determined in accordance with a more objective test which considers the relevant factors of the case and connections the contract has with a particular system of law. In this respect, the closest and most real relationship test is a better and more convincing method to select the proper law when no express choice of law has been made by the parties. In fact, in a number of arbitral awards, it is significant that the implied choice of law test has frequently been skipped by the arbitrators. Instead of following the three-step rule to find the proper law of the contract, after failing to find the parties' express choice the arbitrators simply resort to the closest and most real relationship test to decide the proper law of the contract.

Furthermore, the distinction between the implied choice test and the most real and closest test made by Viscount Dilhorne has had little influence on the development of

the choice of law in international commercial arbitration.[117] In fact, some countries and arbitration institutions have replaced the traditional three-step choice of law rule with a two-step rule. For instance, in Sweden, party autonomy is still the primary principle of conflict of law rules in relation to contracts; however, in the absence of an express choice, Swedish courts are ready to apply the 'centre of gravity test', which allows the judges and arbitrators "to apply the law with which the contract in question has its closest connection, or where its centre of gravity lies."[118] This test was established in a landmark case of *Försäkringsaktiebolaget Skandia v. Riksgäldskontoret,*[119] handed down by the Swedish Supreme Court in 1937. Hobér pointed out that the centre of gravity test replaced the implied choice test, and stated:

> "The *Skandia* case was a landmark case in that it replaced the previously existing theory of the hypothetical will of the parties. The underlying philosophy of this theory was the attempt to establish the will of the parties, as if they had thought of the question of applicable when they entered into the contract. The search for the hypothetical will of the parties was thus a subjective method. By contrast, the centre of gravity test represents a move away from the subjective approach and introduces an objective approach, in that it prescribes the weighing of all objective elements of a legal relationship with a view to finding the law of the country with which the relationship has its closest connection."[120]

Apart from Sweden, a similar change can also be found in the French Code of Civil Procedure 1981,[121] the Netherlands Arbitration Act 1986[122] and the Swiss Private International Law Act 1987,[123] which provides that, "The arbitrator shall decide the dispute according to the rule of law chosen by the parties; in the absence of such a choice, he shall decide according to the rule he deems appropriate."

---

[117] *Whitworth Street Estates Ltd. v. James Miller* [1970] AC 583.

[118] Hobér, Kaj. "In Search for the Centre of Gravity - Applicable Law in International Arbitration in Sweden", *Swedish and International Arbitration*, (1994) pp. 7-43, at p. 8.

[119] *Ibid.* and NJA 1937 p. 1.

[120] *Ibid.* at p. 9. While Hobér distinguishes these two tests, however, he stresses that the difference between them should not be exaggerated as far as the result is concerned, since the hypothetical will of the parties would typically, in most cases, coincide with the law of the country with which the contract has its closest connection.

[121] Article 1496 of the French Code of Civil Procedure 1981.

[122] Article 1054 (2) of the Netherlands Arbitration Act 1986.

[123] Article 187 (1) of the Swiss Private International Law Act 1987.

While the implied choice of law test is criticised for creating a kind of "artificial subjective intention" which may not represent the real intention of the parties, this test has gradually lost its importance in the choice of laws process in international commercial arbitration. In accordance with the new arbitration legislation of some jurisdictions, there appears to be a new trend to adopt the two-stage choice of law rule to decide the proper law of the contract.

While "arbitrators in international commercial arbitrations have shown a growing desire to throw off the shackles of private international law and to avoid dependence, or exclusive dependence, on any particular national law,"[124] another trend in the choice of law is the application of a-national principles as the proper law of the contract in international commercial arbitration. A study of recent arbitral awards showed that arbitrators have frequently moved away from the traditional choice of law rules and chosen the proper law of the contract from the category of a-national principles, such as the new *lex mercatoria*, amiable composition and the general principles of law, to govern the main contract. This new trend will be discussed in the next few chapters.

[124]Goode, "Usage and Its Reception in Transnational Commercial", (1997) 46 *I.C.L.Q.* 1, at p. 6.

Chapter Three

The modern trend in the choice of the proper law - the interaction between the delocalisation theory and the choice of a-national principles

In this chapter, an examination of the modern approach in choosing a-national principles as the proper laws of the contract in international commercial arbitration will be carried out. In parallel with the delocalisation theory which invokes the idea that international commercial arbitration should not be bound to any national legal system, the choice of the proper law has also gone beyond the scope of national laws. Studying the international arbitral awards made during the past twenty years, a trend in choosing a-national principles governing the substantive disputes of the contract can be observed. Such a choice can be made by the parties themselves or by arbitrators. The parties' decision in choosing a-national principles may be caused by lack of satisfaction or little confidence in national legal systems. In relation to the arbitrator's decision on this subject, a-national principles have become an alternative choice outside national laws in international arbitration, especially when no express choice of the proper law is found in the arbitration agreement.

The so-called a-national principles applied in international commercial arbitration include the general principles of law, the new *lex mercatoria* and amiable composition. Although the application of a-national principles is not accepted universally, a more relaxed attitude towards such an application has been shown in a number of judgments and legislation. In this chapter, the discussion will focus on the background to this change. The first section of this chapter will focus on a general discussion of the delocalisation theory and the different opinions on this theory. In the second section of this chapter, the different attitudes of French and English courts towards the

delocalisation theory will be briefly reviewed. This chapter will conclude by pointing out the interaction between the choice of a-national principles and the delocalisation theory.

3.1 The general picture of the delocalisation theory

The delocalisation theory is an idea seeking to detach international commercial arbitrations from controls imposed by the law of the place of arbitration (the *lex fori*).[1] Proponents of the delocalisation theory maintain that international commercial arbitration should not be subject to legal controls which vary from country to country. Particularly, the controls may not suit the fast development and practice of international commercial arbitration. With an intention to eliminate the compulsory controls of the *lex fori*, they maintain that controls mechanism should be exercised by the country where the recognition or enforcement of arbitral awards is sought. Influenced by the idea of detaching international commercial arbitration from the restraints of the *lex fori*, some jurists have dismissed a compulsory application of the choice of law rules of the *lex fori* to determine the substantive law governing the main contract.[2]

The close link between the proper law of the contract and the *lex fori* reflects the potential restrictions of the *lex fori* which can be imposed on the parties' freedom[3] in

---

[1] Accordingly, the delocalisation theory can be applied at two stages of the arbitration procedures. One is delocalising the arbitral procedures from the controls of the *lex fori*. The other one is delocalising arbitral awards. Delocalising the arbitral procedures refers to removing the supervisory authority of the *lex fori* and the local courts where the arbitration is held. As far as delocalised arbitral awards is concerned, it means removing the power of the courts at the place of arbitration to make an internationally effective declaration of the award's nullity. See Paulsson, "The Extent of Independence of International Arbitration from the Law of the Situs", in Lew, *Contemporary Problems in International Arbitration*, (1986) at p. 141 (hereinafter Lew, *Contemporary Problems*).

[2] For example, Professor Jan Paulsson.

[3] The idea of party autonomy is adopted by some conventions, such as: Art. VII (1) of the European Convention on International Commercial Arbitration, 1961; Art. 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965; Art. 33(1) of the UNCITRAL Arbitration Rules, 1976; Art. 33(1) of the Iran-US Claims Tribunal Consolidated Tribunal Rules of Procedure 1983 (Amended in 7 March, 1984). Also, some institutional arbitration

choosing the proper law of the contract. In accordance with the traditional choice of laws rules, the parties' or arbitrator's choice of law is under scrutiny of the public policy and choice of law rules of the place of arbitration. Failing to carry out a detailed investigation into the relevant restrictions of the *lex fori* on the subject of choice of the proper law can result in invalidating such a choice. In other words, the choice of the proper law made by the parties or the arbitrator in excess of the scope allowed by the *lex fori* can be pronounced invalid on the ground that the choice is in conflict with the mandatory rules or public policy of the country where the arbitration is held. For instance, a choice of a-national principles or a law bearing no substantial connection with the case will be pronounced invalid if the choice of law rules of a country explicitly prohibit such choices.

Nonetheless, the restrictions of the *lex fori* on the choice of proper law vary from country to country. Some countries have a more relaxed attitude towards the arbitration held in their territories, whereas others may hold a more hostile attitude towards it. As a result, the delocalisation theory which invokes a detachment of the arbitration procedures from the *lex fori*, has been invoked by a group of jurists since 1960s[4] to avoid a potential invalidation of the chosen laws caused by the compulsory application of the *lex fori* .

They believe that the development of international commercial arbitration may be impeded because of the different restraints imposed on the arbitration procedures by the different national courts since arbitrators not only have to be aware of more than

---

rules adopt it, such as Art. 13 (1) of the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

[4]Paulsson, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", (1981) 30 *I.C.L.Q.* 358. "Delocalisation of International Commercial Arbitration: When and Why It Matters?", (1983) 32 *I.C.L.Q.* 53. Bernini, "The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trail of the New York Convention's Ambit and Workability", in *The Art of Arbitration* (Liber Amicorum for Pieter Sanders) (1982), 50 at p. 58. Lalive, "Les Regles de Conflict de Lois Appliquees au Fond Litige par L'arbitre International Siegeant en Suisse", *Rev.Arb.* (1976), 155 at 159. Discussed in Paulsson, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", (1981) 30 *I.C.L.Q.* 358.

one national law, but also have to juggle with the different restraints imposed by different laws.[5] To eliminate these potential obstacles, in their opinion, the best way is to free the arbitration procedures from the national court's control. Thus, they argue that the arbitration procedures should be 'delocalised' and completely freed from the mandatory rules and public policy of the place of arbitration. In accordance with this theory, the arbitrators do not need to look over their shoulders at the different national mandatory rules and public policy imposed by the laws of the place of arbitration, the place making the contract, the place of performance, or the place of enforcement, and so on. Accordingly, the arbitrators are not only allowed to disregard the *lex fori*, but may also apply any procedural law they regard as appropriate.

3.1.1 Opinions against the delocalisation theory

Not surprisingly, the delocalisation theory is not shared by some traditionalists. The scholars who are in favour of the traditional theory argue that there would be potential risks that arbitrators may abuse their power and the most fundamental due process requirement may not be safeguarded if a complete disregard of the *lex fori* was introduced. As a result of this, the justice the parties are seeking through arbitration will not be guaranteed due to the breakdown of the control mechanism exercised by the national courts.

This school of thought recognises the arbitrators' freedom in choosing the applicable law in the case where no expressed choice is made by the parties. However, the extent of this freedom is only limited to the substantive law of the contract, rather than the procedural law. Therefore, without a procedural law being specified, it would be compulsory for the arbitrators to refer to the *lex fori* to decide the appropriate

[5]Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration", 63 *Tul.L.R.* 647 (1989), at p. 667.

procedures they should follow. In the absence of an express choice of the proper law made by the parties, the law governing the substantive disputes of the contract will be determined in accordance with the choice of law rules of the *lex fori*.

For instance, a dispute concerning whether the goods delivered were defective or not was submitted to an arbitral tribunal sitting in London. No applicable law was mentioned in the arbitration agreement. According to the traditional approach, first of all, the arbitral tribunal has to refer to the relevant English Arbitration Acts to examine the questions of jurisdiction of the tribunal and the validity of the arbitration agreement, and so on. Secondly, if the submission is valid, the arbitration procedures will be governed by the English law. Thirdly, the tribunal is required to apply the English conflict of laws rules to decide the substantive law of the contract. Failing any clear indications of the choice of law, either express or implied, the one which has the most real and closest connection with the case will be chosen by the tribunal. Failing to do so, the validity of the award can be in doubt and challenged in the country where the award is made, that is, England, and where the recognition or enforcement of the award is sought.

The basis of their argument is the denial of the existence of "international" commercial arbitration. Among this group of scholars, Dr. Mann was the most enthusiastic proponent. Dr. Mann argued that every arbitration is a national one because private international law serving as the jurisprudence of arbitration is, in fact, a system of national law after all.[6] Therefore, any international commercial arbitration should be subject to a specific system of national law. As far as the specific national law is concerned, the law of the country of the seat of arbitration is considered as the most suitable one to regulate the arbitration procedures since it can provide the most complete and effective control.

---

[6]Mann, "*Lex Facit Arbitrum*", in *Liber Amicorum for Martin Domke* (Nijhoff 1967), 157 at p. 160.

Furthermore, Dr. Mann insisted that it is essential for the procedures of international commercial arbitration to be conducted on the basis of a given national law. To emphasize his point, he stated:

> "The problem of international arbitration cannot be discussed except against the background of a given *lex arbitri*; the legal systems of the world differ so considerably that no general rule can, or is intended to, be put forward. It follows that, in principle and always subject to such freedom of choice as it may allow, the *lex arbitri* governs the validity and effect of the submission; the constitution of the tribunal; the procedure; the law applicable by the arbitrators; the making, publications, interpretation, annulment and revision of the award."[7]

3.1.2 Opinions favouring the delocalisation theory

Nevertheless, the traditional approach is challenged by the proponents of the delocalisation theory. In their opinion, the application of the delocalisation theory can successfully avoid the uncertainty caused by the mandatory rules and public policy exceptions of the relevant laws. One of their arguments is based on the difference between arbitrators and judges sitting in national courts. Observing the different nature of a national court's judge from a private arbitrator, they claim that arbitrators are under no duty to apply the *lex fori* to the arbitration. As Professor Paulsson said:

> "The international arbitrator is in a fundamentally different position. Whatever one might think of the contractual source of an arbitral tribunal's authority as a purely internal matter, it is difficult to consider the international arbitrator as a manifestation of the power of a State. His mission, conferred by the parties' consent, is one of a private nature, and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration."[8]

Following the suggestion that arbitrators do not have to follow the *lex fori*, it is therefore unnecessary for them to consider the mandatory rules of the *lex fori* when

---

[7]Mann, "State Contracts and International Arbitration", (1967) XLII *Brit.Yrbk.Intl. L.* 1 at p. 6.
[8]Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, (1981) 30 *I.C.L.Q.* 358, at p. 362.

they deal with an international commercial dispute. As a result, they recommend that the supervisory powers should only be exercised by the courts where the recognition or enforcement is sought. Nevertheless, to avoid misunderstanding, he points out that the purpose of this theory is not to try to escape from the national court's control, but rather to promote the acceptance of delocalised arbitral awards. As he states: "To seek completely to avoid national jurisdictions would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdiction could be called upon to recognise and enforce awards."[9] Furthermore, "... the delocalised award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin."[10]

Apart from this academic support, in practice, ICC awards also have made contributions towards the development of delocalisation theory. Within the ICC framework, the practitioners try to create an autonomous atmosphere with the aim of making a country attractive as a location for holding international commercial arbitration by marrying the *laissez-faire* theory and the commercial motive behind the trend in modern arbitration law. The ICC does not want the results of the ICC arbitration to depend on the situs;[11] therefore, they try to promote the delocalisation theory by saying: "... the courts of the place of arbitration should assume a role in international commercial arbitration as one designed to control the *bona fide* of the award on an international, rather than a national, level and they accordingly should function:[12]

> only as an instrument for the control of the conformity of the award to transnational minimum standards such as those embodied in the major international conventions. Unless the parties have agreed otherwise, the judge

[9]Paulsson, "Delocalisation of International Commercial Arbitration: When and Why It Matters?", (1983) 32 *I.C.L.Q.* 53 at p. 54.
[10]*Ibid.* at p. 57.
[11]Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration*, (2d ed. 1990), at p. 11 (hereinafter Craig, Park, and Paulsson, *ICC Arbitration*).
[12] *Ibid.* at p. 11-12.

> at the place of arbitration has no mission or capacity to apply his own national criteria to the award.""[13]

They also criticise the idea of a compulsory application of the *lex fori* to international commercial arbitration when no express procedural choice of law is made by the parties. First, they stress that, in practice, the place of arbitration is often chosen by the ICC, therefore, the compulsory application of the *lex fori* to the arbitration procedures does not reflect the parties' minds. Secondly, they emphasise that the parties' legitimate expectations may not be fully reflected by applying the *lex fori* if neutrality is the main consideration of the choice. As Mr. Delaume stated:

> "Except in those situations in which compliance with mandatory rules is required, the parties are generally free to choose by way of express stipulation the law applicable to their relationship. In the overwhelming majority of cases, the law stipulated applicable is the domestic law of a specific country to which the contract bears some connection or the law of a 'third' country selected for reason of expertise (such as English law in regard to maritime matters) or of 'neutrality' (such as Swedish, Swiss or French law)..."[14]

While making an effort to free the parties from the restraints imposed by the relevant municipal procedural laws, the ICC also supports Professor Paulsson's arguments concerning the difference between the judges and arbitrators.[15] In an ICC arbitration case, the arbitrator said: "The rules determining the applicable law vary from one country to the next. State judges derive them from their own national legislation, the *lex fori*. But an arbitral tribunal has no *lex fori* in the strictest sense of the word, particularly when the arbitration case is of an international nature."[16]

The ICC encourages its arbitrators to conduct an arbitration in conformity with the ICC Rules which are consistent with the delocalisation theory. As Article 11 of the

---

[13]Paulsson, "Arbitration Unbound", (1981) 30 *I.C.L.Q.* 358.

[14]Passage from Delaume, *Transnational Arbitration*, Part II, Chapter VII at p. 2 also quoted in W. Craig, Park, and Paulsson, *ICC Arbitration*, (2d ed. 1990) at p. 123.

[15] Mann, "State Contracts and International Arbitration", (1967) XLII *Brit.Yrbk.Intl.L.* 1 at p. 6.

[16]ICC case no. 1689; Craig, "International Ambition and National Restraints in ICC Arbitration", (1985) 1(1) *Arbitration Int.* 49-81, at p. 65.

ICC Rules,[17] which grants the arbitrators more powers in conducting the arbitration procedures, stipulates:

> "The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration."

In accordance with Article 11, in the absence of parties' express choice, the duty to determine which law is applied to the arbitration procedures is transferred to the arbitrators; moreover, the application of the mandatory rules and public policy of the *lex fori* is no longer required.

The SEEE arbitration,[18] which was under the supervision of the ICC, can be a suitable example to illustrate the delocalisation theory. The SEEE arbitration involved a dispute arising from a railway construction project in the former Yugoslavia between Yugoslavia and a French company, later replaced by SEEE. The SEEE claimed that they did not receive full payment due to the devaluation of the French franc. An arbitral tribunal composed of two arbitrators acted as *amiable compositeurs* and rendered an award in favour of the SEEE in Lausanne in 1956 and ordered Yugoslavia to pay SEEE 62 million French francs.

Yugoslavia tried to set aside this award in the cantonal Court of Appeal in Vaud by claiming the arbitral tribunal was composed of an even number of arbitrators which violated the Vaud cantonal law. Nonetheless, the Swiss court refused to hear the case on the grounds that it was without jurisdiction because the parties had not intended to subject themselves to the law of Canton of Vaud. Furthermore, the arbitral award was returned to the party having filed it (the SEEE) since it did not constitute an arbitral

---

[17] Rules of Arbitration of the International Chamber of Commerce, 1988.

[18] *Société Europeane d'Etudes et d'Enterprise (S.E.E.E.) v. Yugoslavia* (1959) *J.D.I.* 1074; a detailed discussion is contained in Paulsson, The Extent of Independence of International Arbitration from the Law of the Situs, in Lew, *Contemporary Problems*, (1986), 141-163, at pp. 142-146.

decision as understood by Article 516 of the Code of Procedure of Vaud. SEEE's further appeal to the Swiss Federal tribunal was also rejected. Later, in 1975, SEEE's attempts to enforce the award in Holland also ended in failure on the grounds that the judgment delivered by the Vaud Cantonal Tribunal had the same effect as an annulment.

Despite the fact that the award was detached from its country of origin in 1977, SEEE made another attempt to enforce this award in the Court of Appeal in Rouen which became successful. The court accepted the award despite its absence of connection with the place of the arbitration. The Court of Appeal in Rouen held:

> "-that the Swiss decisions did not have the effect of setting the award aside, nor eliminating its legal existence; and that they only set forth that the award escapes the judicial sovereign of Vaud.
> -that the law of the place of arbitration does not always and necessarily govern the arbitral proceedings
> -that the 'procedural law' that governs the arbitration may equally be another national law or the agreement of the parties;
> -that in this case the arbitration clause excludes the application of national laws of procedure since it defines its own procedure;
> that the arbitration clause provides that the arbitrators are exempt from any formality, that they may decide as *amiable compositeur*, and that their decisions, or as the case may be those of the umpire, are final and binding on both parties."[19]

Finally, the award was enforced in France by the application of the New York Convention. This case is regarded as a victory for the delocalisation theory since it illustrated that a foreign award might be enforced even though this award was detached from its country of origin.[20]

Although it has failed to receive sufficient support from most states, the idea of the delocalisation theory has interacted with the choice of a-national principles in a particular way. Accordingly, instead of following the strict choice of law rules,

---

[19]Translation cited from Paulsson, "The Extent of Independence of International Arbitration from the Law of the Situs", in Lew, *Contemporary Problems*, (1986), 141-163, at p. 145.

[20]Despite the decision of the Court of Appeal in Rouen,the recognition of the award was rejected by the Dutch Supreme Court on other grounds in 1975 at a later stage. The Dutch Supreme Court regarded the Swiss refusal to hear the case as equivalent to setting aside the award.

arbitrators are granted more discretion to choose the proper law. Also, the choice of the proper law has also gone beyond the national law regimes while the emergence of a-national principles has attracted the attention of the theorists and practitioners. The proponents, who are in favour of the application of a-national principles in international arbitration, argue that the existing national laws are insufficient to cope with complicated international commercial disputes. Furthermore, the disputes arising from international commerce should be governed by a-national principles which have been developed for such purpose.

The change which has resulted from the interaction between the delocalisation theory and the application of a-national principles has also been noted in a number of new arbitration statutes, international conventions and the rules of some arbitration institutions. For instance, Article VII (1) of the European Convention on International Commercial Arbitration, 1961 stipulates:

> "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable."

A similar provision can also be seen in Article 33(1) of the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the UNCITRAL Arbitration Rules) and Art. 33(1) of the Iran-US Claims Tribunal Consolidated Tribunal Rules of Procedure 1983 (Amended in 7 March, 1984) (Iran-US Tribunal Rules). Also, it is adopted in Art. 13(3) of the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC Arbitration Rules).

3.2 Attitudes held by the different national courts towards the delocalisation theory - France and England

3.2.1 France

To some extent, the delocalisation theory has received support in jurisdictions, such as France, Switzerland and Belgium. Taking France as an example, French courts have always had a very friendly attitude towards international commercial arbitration conducted within its territory. A number of French jurists regard an international contract as a contract detaching from the national laws, both substantive and procedural aspects.[21] Following this idea, it is widely supported by the French scholars that the parties have the rights and freedom to design or facilitate the arbitral procedures in accordance with their own wishes and expectations. Influenced by this idea and combined with the intention to make France a more attractive venue for international commercial arbitration, the delocalisation theory which involves detaching the arbitral procedures from the *lex fori*, has became an attractive notion among the French jurists.

Believing that lifting the restraints of the *lex fori* would promote the development of international commercial arbitration, France decided to incorporate the notion of the delocalisation theory[22] into its legal system. As a result, French courts have given international commercial arbitration a special status by limiting their judicial powers. The French courts try to interfere with the arbitration procedures as little as possible and set limited grounds for reviewing international arbitral awards.

The most significant change is the enactment of The Decree of May 12, 1981, (the "1981 Decree") which is incorporated into the New Code of Civil Procedure, 1981. With the intention of making France the most attractive venue for international commercial arbitration, the 1981 Decree tries to create an environment friendly to international commercial arbitration conducted in France.[23] This Decree represents the

---

[21]See Fouchard, *L'arbitrage Commercial International* (1965); discussed in Sanders, "Trends in the Field of International Commercial Arbitration", (1975) 145 II *Rec.dec Cours* 20.
[22]Craig, Park and Paulsson, (1981). "French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981", (1981) 13 *Law & Pol.Int.B.* 728.
[23]Carbonneau, "The Elaboration of a French Court of International Commercial Arbitration : A Study in Liberal Judicial Creativity", 55 *Tul.L.Rev.* 1 (1981) at pp. 15-16.

absoluteness of the French *laissez-faire* approach applied to international commercial arbitration, and reveals a reluctance to exercise its judicial control over the integrity of arbitral proceedings conducted in France. The spirit of the new Decree was shown in two famous cases decided by *the Court of Appeal of Paris* in the 1980s. One is *General National Maritime Transport Company v. Götaverken Arendal A.B.*,[24] the other is the *Norsolor case*.[25]

In the case of *General National Maritime Transport Company v. Götaverken Arendal A.B.*, the French Court of Appeal held that the court lacked jurisdiction to hear the challenge because the award was not French. The dispute which arose in relation to a set of substantially identical contracts whereby Götaverken undertook to construct three tankers for Libyan Maritime Co. However, Libyan Maritime Co. refused to take delivery of the vessels after having previously paid three fourths of the total purchase price after the performance. The dispute was submitted to ICC in Paris for arbitration according to the contracts. The arbitral tribunal made an award by a majority decision[26] dated April 5, 1978, which rejected Libyan Maritime Co.'s defence and made an award in favour of Götaverken. Libyan Maritime Co. tried to bring an action to set aside the award in the Court of Appeal in Paris. Meanwhile, in Sweden, the winning party tried to attach the vessels and sought recognition of the award.

Götaverken raised the issue whether the French courts had jurisdiction to control international arbitral proceedings on the sole grounds that France had happened to provide geographically neutral grounds for the arbitration. Furthermore, Götaverken argued that there was no need for the arbitral proceedings to be attached to any national legal system. The reason is that under the New York Convention, the law of the place

---

[24]Decision of Feb. 21, 1980, Court of Appeal, Paris, 107 (1980) *J.D.I.* 660, [1980] *Rev.Arb.* 524, reprinted in 20 *I.L.M.* 883 (1981).

[25] *AKSA v. Norsolor*, Judgement of 9 December 1980, Cour d'Appeal, Paris (1980) published in [1981] *Rev.Arb.* 306. An English translation published in (1981) 20 *I.L.M.* 883, at p. 888. Report of the Supreme Court of Vienna, Nov. 18, 1982 was reprinted in [1984] IX *Y.B.C.A.* 159.

[26] The Libyan arbitrator refused to sign the award.

of arbitration only has control over the proceedings in the absence of a specific choice made by the parties. In the opinion of the Court of Appeal in Paris, the agreement was presented by reference to the ICC Rules. In accordance with these Rules, Article 11 authorises the detachment of arbitral proceedings from the local law.

The Court of Appeal in Paris refused to exercise jurisdiction over Libyan Maritime Co's actions against the arbitral award rendered in Paris. It confirmed that the parties had the freedom to choose any law they wished to govern the procedural issues arising from the arbitration on the ground that the ICC Arbitration Rules 1975 was selected. Considering the facts of this case, neither of the parties nor their transaction had a connection with France, neither they nor the arbitrators had chosen to declare French law to apply to the proceedings, and finally as the ICC Rules no longer mandated the application of the law of the seat of arbitration in the absence of a choice by the parties, the Court of Appeal concluded that French law was not applicable to the arbitration and it did not have jurisdiction to hear the challenge since the case was not subject to the French legal order nor was the award French in nationality.[27] Furthermore, the Court confirmed that the parties to international commercial arbitration are free to select the legal order to which they wish to govern the proceedings, and this freedom extends to the exclusion of any national system of law.

As far as the action brought in Sweden is concerned, one of Libyan Maritime Co.'s main defences against the actions was that the award was not binding anywhere and it was pending a challenge brought before the courts in the country where it was rendered, that is, France. However, the Swedish Supreme Court declared the award

---

[27] The Swedish courts deemed the award to have been "binding" - in the sense of the New York Convention.- as of the moment it was rendered. This was because in accepting to arbitrate under ICC Rules, the parties had waived the right to appeal. It is significant to note that the Swedish courts did not inquire whether the award was binding under French law, but as a function of the parties' contractual stipulation, recognised and given effect by the Swedish legal system. The English translation was published in 21 *Virginia J.Intl.L.* 244 (1981).

immediately enforceable irrespective of the existence of an action in France to set it aside.

Ten months later, a similar issue was submitted to the Court of Appeal in Paris. In the case of *ASKA v. Norsolor*[28] the successful party was a French company (Norsolor). ASKA, a Turkish textile company, sought a judicial review on an ICC award which denied their claim for restitution of part of the purchase price of materials ordered by Norsolor. Similar to the *Götaverken* case, the contract between the parties included an arbitration clause which conferred jurisdiction on the ICC without specifying any procedural law to be applied to the arbitration procedures. Following the decision made in the *Götaverken* case, and regardless of the fact that France was the place of arbitration and the defendant was a French company, the Court of Appeal held that the case concerned a non-French award which was subject to the remedies available for foreign awards and dismissed the case on the ground of lack of jurisdiction.

These two decisions made by the Court of Appeal in Paris deliver a clear message concerning the acceptance of the phenomenon of the delocalisation theory by French courts. In addition, the Court of Appeal also denied the suggestion that the national courts of the place of arbitration should have an overwhelming authority to rule on the validity of the proceedings since, as stressed by the Court of Appeal of Paris, sometimes the place of arbitration was chosen only in the interest of geographical neutrality and that should not be considered an implicit expression of the parties' intention to subject themselves to the procedural law of France. This idea is reflected in Professor Paulsson's article, as he emphasises:

> "The message seems clear: one is authorised to concluded that the binding force of an international award may be derived from the contractual commitment to arbitrate in and of itself, that is to say without a specific national legal system serving as its foundation. In this sense, an arbitral award

[28] *AKSA v. Norsolor*, Judgment of 9 December 1980, Cour d'Appeal, Paris (1980) published in [1981] *Rev.Arb.* 306. An English translation is published in (1981) 20 *I.L.M.* 883 at p. 888.

> may indeed "drift", but of course it is ultimately subject to the post facto control of the execution jurisdiction(s)."[29]

Eventually, the influence of these two cases can be observed in the 1981 Decree which has an intention to free the arbitral procedures from the restraints of the *lex fori* .

3.2.2 England

Compared with the French legal system, English courts have given the *lex fori* greater significance. Traditionally, if no choice of law is expressed by the parties, the English courts have tended to take it for granted that the arbitrators are bound to apply the English procedural law to the arbitration which is held in England. Even in the case where the parties express their choice of the applicable laws, the mandatory rules and public policy of English law still override the choice of law. The courts believe that the principles applied to arbitration should be the same as those apply to the court proceedings which are governed by the *lex fori.*

This approach has been adopted at least since Lord Brougham's judgment in *Don v. Lippmann.*[30] Lord Mustill was the most notable proponent who fought for this traditional approach. He stated that, as far as the arbitral procedures of international commercial arbitration are concerned, it cannot "exist without an internal procedural law."[31] This unfavourable attitude towards the theory of delocalisation was observed by some foreign commentators. For instance, in a comparison study between English and Swedish arbitration, Dr. G. Wetter reported this trend of resistance and stated:

> "London is the locale of the greatest number of international arbitrations in the world, yet the vast majority of these are viewed by the arbitrators, counsel and

---

[29]Paulsson, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", (1981) 30 *I.C.L.Q.* 358, at p. 368.
[30]5 Cl. & F. 1.
[31]Mustill, "Transnational Arbitration in English Law", (1984) 37 *Curr.L.Pr.* 133 at p. 142.

> the parties as wholly domestic in character in the sense that the proceedings are indistinguishable from those which take place between two English parties." [32]

As far as the case law is concerned, this traditional approach is upheld by a series of cases. The case of *Whitworth Street Estates (Manchester) Ltd. v. James Miller*,[33] is one of them. Although the House of Lords held that the law governing the arbitral procedures can be different from the one applied to the substantive dispute, the arbitral procedures still had to follow the rules of the *lex fori*. Therefore, in this case, the arbitral procedures should be governed by the law of the place of arbitration, that is Scotland, even though the substantive disputes arising from the contract were governed by English law.

This same approach was also adopted by Lord Denning M.R. in the case of *International Tank and Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C.*[34] where the dispute arose from a civil engineering contract between the parties. He explained:

> "The contract itself is to be construed by English law. .. But the arbitration is to be governed by the law of Kuwait or some other country. I say this because the arbitration is governed by the rules of the International Chamber of Commerce. ... And the rules of the International Chamber of Commerce say in article 16 that the arbitration is governed by the rules:
>
> > "of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings."
>
> Thus, the parties may choose that the arbitration procedure is to be governed by the law of some country other than England. If they do not so choose, the procedure will be governed by the law where the arbitrator sits. That may be in Kuwait."[35]

---

[32]Wetter, "Choice of Law in International Arbitration Proceedings in Sweden", (1986) 2 *Arbitration Int.* 294, at p. 298. It was discussed in a comparison between the English and Swedish arbitrations. As far as the Swedish arbitrations are concerned, he said: "In Sweden, to the contrary, arbitrations in which at least one party is non-Swedish are treated as being multi-dimensional, in recognition of the particular requirements and problems inherent in transnational disputes."

[33][1970] AC 583 (HL).

[34][1975] 1 QB 224.

[35]*Ibid.* at p. 232.

The hostile attitude towards the delocalisation theory was also shown in the case of *Bank Mellat v. Helliniki Techniki SA.*[36] Supporting the supervisory and controlling role of national courts[37], Kerr J. said:

> "The fundamental principle in this connection is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections. ... Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law."[38]

Again, in the case of *President of India v. La Pintada Compania Navigation S.A.*,[39] the House of Lords regarded the parties' submission to arbitration held in England as an indication that their arbitration procedures should be governed by English law. As the court stated: "They impliedly agree that the arbitration is to be considered in accordance in all respects with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise."[40]

Again, the delocalisation theory was rejected by the Court of Appeal in the case of *Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru.*[41] The court stressed: "English law does not recognise the concept of a 'delocalised' arbitration or of 'arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law'. Accordingly, every arbitration must have a 'seat' or *locus arbitri* of forum which subjects its procedural rules to the municipal law which is there in force."

---

[36][1984] QB 291.
[37]*Ibid.* at p. 301., however, such a supervisory role discussed by Kerr J. in relation to section 12 (6) of the Arbitration Act, has been significantly curtailed by the Arbitration Acts 1979 and 1996.
[38][1984] QB 291, 301. Also see Dr. Mann, "*Lex Facit Arbitrum*", in *Liber Amicorum for Martin Domke*, 157 (Nijhoff 1967), at p. 167.
[39][1985] 1 AC 104.
[40]*Ibid.* at p. 119.
[41]Court of Appeal, 10 November 1987; Unpublished case. Reprinted in (1988) XIII *Y.B.C.A.* 156-164, at pp. 159-160.

Saville J. expressed the difficulties in applying the delocalisation theory in the case of *Union of India v. McDonnell Douglas Corporation.*[42] He said:

> "It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but again this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, ... it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country, or indeed by any other means unless such is sanctioned by those Acts themselves."[43]

Finally, in a minority judgment in the case of *Coppeé Lavalin v. Ken-Ren,*[44] in 1994, Lord Mustill rejected the delocalisation theory once again. He denied any possibility of the development of the delocalisation and harmonisation theories by saying:

> ""Transnationalism" is a theoretical ideal which posits that international arbitration, at least as regards certain types of contractual disputes conducted under the auspices of an arbitral institution arbitration, is a self-contained juridical system, by its very nature separate from national systems of law, and indeed antithetical to them. If the ideal is fully realised national courts will not feature in the law and practice of international arbitration at all and difference between national laws will become irrelevant.
> ...
> I doubt whether in its purest sense the doctrine now commands widespread support: as witness the recognition of court-imposed interim measures in, among others, art 9 of the UNCITRAL Model Law and art 8(5) of the ICC rules. At all events it cannot be the law of England, for otherwise this House would have dismissed at the very outset the attempt in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*[45] to procure an interim injunction during the currency of an ICC Arbitration."[46]

3.3 Interaction between the choice of a-national principles and the delocalisation theory

---

[42][1993] 2 Ll Rep 48.
[43]*Ibid.* at pp. 50-51.
[44][1994] 2 WLR 631 (HL).
[45][1993] AC 384.
[46][1994] 2 WLR 631 (HL), at p. 640.

Although the delocalisation theory fails to attract support from most jurisdictions, unexpectedly, the idea of detaching arbitration from the national laws has had an effect on the subject of the choice of the proper law. Since the 1960s, parallel with the development of the delocalisation theory, the traditional choice of national laws as the proper laws of the contract by means of choice of law rules has been re-addressed. A new change in the method of selecting the proper law of the contract has developed. Claiming the deficiency of national laws, some jurists invoke the application of a-national principles to resolve the complicated international commercial disputes

The application of a-national principles to international arbitral awards, thereby departing from the national law regime and the traditional choice of law rules, in the opinion of the writer, results from the interactions between the delocalisation theory in the procedural aspects and the demands for a truly international trade law to govern the substantive disputes submitted to international commercial arbitration. Being applied in some major international commercial arbitration cases, gradually, a-national principles appear to be an alternative choice of law away from the choice of purely national laws as the proper law of the contract.

For the past three decades, international arbitrators have been inclined to escape the restraints imposed by the local conflict of law rules when they face difficulties in choosing the proper law of the contract. Instead of following the conventional choice of law rules to choose the proper law, arbitrators sometimes decide to 'skip' the so-called three stages in the choice of law rules and select a-national principles to govern the substantive disputes of the contract. In fact, during the past thirty years, a substantial number of international arbitral awards have been made on the basis of a-national principles, such as the general principles of law, the new *lex mercatoria*, and amiable composition.

This movement has led to changes in domestic legislation, such as the French New Code of Civil Procedure, the Netherlands Arbitration Acts 1986,[47] the Swiss Private International Law Act 1987,[48] the English Arbitration Act 1996,[49] and so on. For instance, this kind of interaction can be observed in Article 1496 of the French New Code of Civil Procedure which has expressly departed from the traditional conflict of laws. This Article grants the parties the freedom to choose the substantive law applicable to the merits of the dispute. Secondly, failing to make such a choice between the parties, the arbitrators shall decide the case in accordance with the rules of law they consider appropriate, provided that they shall always take into account trade usages. Accordingly, the arbitral tribunal is no longer under an obligation to look into the local choice of law rules but is allowed to choose directly the substantive law which it deems as the most suitable one to settle the dispute between the parties. Moreover, the arbitrators are allowed to apply the new *lex mercatoria* or, with parties authorisation, to decide the case as *amiable compositeurs*.[50]

The same movement has also flourished in the United States. Historically, a hostile attitude towards international commercial arbitration has been held by the American courts. The courts, both federal and state, have declined to enforce a clause which had the effect of ousting the jurisdiction of the court.[51] The hostile attitude was strongly shown in the leading case, *Wilko v. Swan*.[52] A ruling that arbitrators were bound to follow the law even though the arbitration agreement does not specifically so provide was handed down. In this case, the plaintiff, a purchaser of securities, sued the seller

---

[47]Article 1054 (2) of the Netherlands Arbitration Acts 1986.

[48]Article 187 of the Swiss Private International Law Act 1987 has abandoned the traditional three-step choice of laws procedures. As it provides: "The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection."

[49]Section 46.

[50]Articles 1496 and 1497 of the French New Code of Civil Procedure.

[51]See *Nute v. Hamilton Mutual Ins. Co.* 72 Mass (6 Gray) 174 (1856), *Nashua River Paper Co. v. Hammermill Paper Co.* 223 Mass. 8, 111 NE 678 (1916) and *Benson v. Eastern Bldg. & Loan Assn.*, 174 NY 83, 66 NE 627 (1903).

[52]346 US 427, 98 L. Ed. 168, 74 S Ct. 182.

to recover damages under Article 12(2) of the Securities Act of 1933 for false representations made in concluding the sale. An arbitration agreement was contained in the contract. Nonetheless, the court decided that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933. Again, the court observed:

> "Arbitrators may not disregard the law. Specially they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)," ... It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," ... Appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear or want of it will upset the award."[53]

Therefore, following this rule, it could be possible for the courts to vacate awards for a type of excess of authority on the basis of manifest disregard of the law.

However, the centuries of judicial hostility towards arbitration were reversed by the enactment of the Federal Arbitration Act 1925. Observing the fact that the compulsory application of the *lex fori* may lead to an undesirable result, the concept of delocalisation has been advanced as providing an appropriate escape from undue state-law limitations in the American system. The freedom of selection of forum and choice of governing law by the parties to an international contract was confirmed in the case of *M/S Bremen v. Zapata Off-Shore Co.*[54] in 1972, where the earlier judicial resistance to being denied of jurisdiction in international commercial disputes was reversed. Also, the forum selection clause is recognised as valid and enforceable, where the court said:

> "For at least two decades we have witnessed an expression of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. ... The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we

---

[53] *Ibid.* at p. 440.

[54] 407 US 1, 32 L. Ed. 2d. 513, 92 S.Ct. 1907.

> insist on a parochial concept that all disputes must be resolved under our laws and in our court."[55]

Moreover, this new approach was described as "substantially that followed in other common-law countries including England. ... It accords with ancient concept of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world."[56] Influenced by this liberal attitude, a victory has been claimed over the arbitrability of some anti-trust disputes.[57] Furthermore, the application of a-national principles to decide the substantive disputes of the contract has also been confirmed in a number of cases.[58]

---

[55]*Ibid.* at pp. 519-520.
[56]Also see, *National Equipment Rental, Ltd. v. Szukhent*, 375 US 311, 11 L.Ed. 2d. 354, 84 S.Ct. 411 (1964).
[57]*Scherk v. Alberto-Culver Co.*, 417 US 506 (1974), 41 L. Ed. 2d. 270, 94 S.Ct. 249, at p. 279 and at pp. 280-281.
[58]A detailed discussion will be carried out in Chapter Nine.

Summary of Part One

As highlighted in the discussion carried out in Part One of this thesis, it can be observed that international arbitrators not only simplify the traditional choice of law rules into a modern two-step procedure but also expand the scope of applicable proper law. While increasing numbers of international commercial arbitration cases are conducted on a global scale and lack of confidence in national law regimes among international business people, arbitrators no longer confine themselves within the scope of national laws. Frequently, with or without parties' express consent, arbitrators search the proper law outside of national law regime and apply a-national principles to resolve disputes. Such an application of a-national principles in international commercial arbitration will be examined in Part Two of this thesis.

PART TWO

The Application of A-National Principles As the Proper Law of Contracts in International Commercial Arbitration

Introduction to Part Two

It has been said:

> "it is artificial to force all arbitrations into the two categories of national and foreign arbitration. By the nature of things another distinction has to be made between arbitration of disputes involving domestic trade and of those involving international trade. The first is, quite normally, subject to some national law, the second calls for the application of international law."[1]

While the proponents of the delocalisation theory still fight to get support from different national jurisdictions, a-national principles have frequently been chosen as the proper law to be applied in a number of international arbitral awards. This part of the thesis examines the application of a-national principles in international commercial arbitration. As previously outlined the term "a-national principles" includes the general principles of law, the new *lex mercatoria*, and amiable composition . This part of the thesis is composed of three chapters. First, Chapter Four will discuss cases where the application of the general principles of law have been applied to decide the substantive disputes of the contract in international commercial arbitration. The examination will mainly be based on the awards made in *ad hoc* arbitrations and a limited number of awards made by the Iran-United States Arbitral Claims Tribunal and International Centre for the Settlement of Investment Disputes ("ICSID arbitration"). Secondly, Chapter Five will highlight the application of the new *lex mercatoria* in international commercial disputes. ICC arbitral awards will be the primary basis of this study. Finally, arbitral awards which are made on the basis of amiable composition will be examined and analysed in Chapter Six.

---

[1] David, *International Trade Law*, (1985), at p. 136.

Chapter Four

The application of the general principles of law as the proper law of the contract in international commercial arbitration

4.1 Background

The application of the general principles of law has found acceptance first in international arbitral awards. Instead of determining under which national law ought to be applied, international arbitrators, in some cases, deliberately leave this question unanswered or simply apply the general principles of law and claim that by doing so they are acting in accordance with the will of the parties. Influenced by the idea that such practice is well-suited to the particular needs of international trade, some national courts[1] have shown a relaxed attitude towards it, occasionally setting aside some of their rules (the *lex fori*) in order to correspond with such practice.

From a number of *ad hoc* arbitrations reported, it can be seen that the general principles of law have often been chosen to govern state contracts. With respect to the source of the general principles of law, Article 38 of the International Court of Justice Statutes has provided some clues as follows:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;
> a. international conventions, whether general or particular, establishing rules expressly recognised by the contracting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognised by civilised nations;
> d. subject to the provisions of Art. 59 (concerning the relative effects of judgments), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[1] Such as France, see the new French Civil Code of Procedure 1981.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

After World War II, in the sunset of the colonial era, many new countries were founded. In order to build up the political and economic strength of these countries, a number of opportunities to enter into contracts of investment, concession or economic development with the state governments were offered to western businessmen. This type of contract, which involved both a state or state enterprise and a private party, is termed a "state contract". Due to the special nature of state contracts, such as instability of the governments, unequal bargaining power between the parties, frequent change of legislation of the host country, and so on, it is not surprising that disputes arise from time to time. Among the different dispute settlement mechanisms, arbitration is regarded as the most suitable choice to resolve disputes arising from a state contract.

While arbitration has frequently dealt with disputes arising from a state contract, as far as the choice of the proper law in state contracts is concerned, national laws are seldom chosen by the parties. Due to the distrust and hostility towards the other party's judicial system, the parties to a state contract are reluctant to have the disputes governed by it. Under these circumstances, a law which has a neutral character appears to be more desirable. As a result, the choice of a-national principles or a complex amalgam of national and a-national principles is often selected to be the proper law of the contract by the parties or the arbitrators. In fact, arbitrators do, at times, decide to apply the general principles of law rather than any specific national law. A number of international arbitral awards have been decided on the basis of the general principles of law, especially those arising from major international state contracts, for example, oil concession or mining agreements.

In this chapter the discussion will initially focus on the cases and comments that are against the application of the general principles of law in private international commercial arbitration. The second section of this chapter, which examines *ad hoc*, ICSID and Iran-US arbitrations, will discuss the awards made on the basis of the general principles of law, despite the objections against such practice.

4.2 The opinions against the application of international law as the proper law of a contract

Not every jurist or practitioner is in favour of the application of the general principles of law as the proper law of the contract. In fact, the application of the general principles of law in international commercial arbitration has been criticised by two schools of thought and from different angles.

Following the traditional idea that the subject of international law is a state, one school of thought argues that international law cannot be the governing law of a contract between two individuals, even though one of them is a sovereign state. They insist that international law is solely designed to govern the relationship between states. Moreover, private individuals should not fall into the ambit of international law.[2] This opinion is upheld in the *Serbian Loans* case,[3] where the court first rejected the idea of elevating a foreign investment transaction to the status of a treaty.[4] Secondly, the court decided that it was inappropriate to apply international law to govern disputes arising from a foreign investment contract between a sovereign state and a private party. Finally, they ruled that this type of relationship can only be governed by the municipal legal systems.

---

[2]Sornarajah, "The Climate of International Arbitration", (1991) 8(2) *J.I.A.* 47, at p. 53.
[3](1929) *PCIJ Series A*, no. 14, P. 5, 11 W.C. 340 (1929).
[4]The idea of elevating a foreign investment transaction to a treaty was applied in the *Wimbledon* case, [1926] *PCIJ Series A*, no. 1, p. 25.

This group also questions whether a foreign or multinational corporation as a party to a state contract has sufficient personality to enjoy the protection provided by international law. They argue that it is very difficult to establish a logical basis for such a situation. The same question is raised in the Draft Code of Conduct for Multinational Corporations, whose purpose is to provide guidelines for a multinational corporation conducting business in a host state, rather than providing an argument for conferring a special personality on such kind of corporations.[5] The committee suggested that there was a lack of consideration of the interest of the host states and they criticised the arbitral awards which were made in favour of the application of international law by only considering the interests of the foreign investors. In their opinion, these arbitrators only looked at the possibility that the law of the host state would cause bias against the investors; however, they ignored the fact that an investment contract does not always bring good things to the host state (for instance, the influx of capital may damage the economy of the host state under an investment contract).

Another group of commentators found their argument on the basis of wavier of sovereign immunity. They maintain that a contract, regardless of whether it is between two private parties or a private party and a sovereign state, should only be governed by private laws. They believe that the sovereign immunity of the state involved in a state contract has been waived when the state agrees to refer the dispute to arbitration. This idea is strongly invoked by Mr. Luzzatto. He maintains that a contract between a state party and a private party should be regarded as a contract between two private parties, and the dispute arising from this kind of contract should be governed by private laws. He explains:

---

[5]Sornarajah, "The Climate of International Arbitration", (1991) 8(2) *J.I.A.* 47, at p. 55.

> "In principle, there can be little doubt, if any, that international arbitrations arising from a dispute between States and foreign subjects, under a contractual relationship between the parties, should be put on the same level as arbitrations between two private parties, and not as arbitrations between States which are governed as such by public international law.[6]

The reasons behind this theory are twofold. First, from a theoretical point of view, it is a fallacy to assume that, through a state contract, a foreign private party can enjoy the same rights and obligations under international law as a state. Based on the same argument, it is similarly fallacious to presume that the international responsibilities of a state can be imposed upon a foreign corporation or an individual private investor. Secondly, from a practical viewpoint, they argue that the content of international law is not comprehensive enough to cope with complicated international commercial disputes. This is because international law does not contain rules that are applicable to private contractual relationships. As explained by Mr. Sornarajah in a recent article:

> "The idea that international law could apply to such a contract would have sounded odd as a proposition simply because international law did not contain and does not contain any rules which give validity to such contracts and did not contain any rules of substantive law relating such contracts."[7]

In fact, international law has not been provided with an opportunity to develop a set of detailed contractual rules to govern commercial disputes, such as breach or frustration of the contract.[8] Furthermore, in their opinion, such rules simply do not exist in international law at all.[9] As a scholar commented: "Public international law neither

---

[6]Luzzatto, "International Commercial Arbitration and the Municipal Law of States", (1977) 157 *Rec.des Cour*, 87.

[7]Sornarajah, "The Climate of International Arbitration", (1991) 8(2) *J.I.A.* 47, at p. 53.

[8]Lipstein, "International Arbitration between Individuals and Governments and Conflict of Laws", in Cheng and Brown (eds). *Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger on his Eightieth Birthday*, (1988), 180, at p. 183. and Lew, *Applicable Law in International Commercial Arbitration*, (1986) at p. 403 (hereinafter Lew, *Applicable Law*), and Amerasinghe, "State Breaches of Contracts With Alien and International Law", 2 *Am.J.Int.Law* 58 (1964), at p. 81, and Redfern and Hunter, *International Commercial Arbitration*, (2nd ed. 1991) at pp. 80-81.

[9]*Ibid.*

aims nor is equipped to regulate the commercial relations and activities of private individuals and organisations in the international arena."[10]

Despite these objections, in a number of major international commercial arbitrations, the general principles of law have been chosen as the proper law. This practice has attracted a great deal of attention and controversy after a series of arbitral awards were made to settle the disputes arising from oil concession agreements, especially the cases where the Libyan government was involved during the period 1971-1973.

4.3 The application of the general principles of law in *ad hoc* arbitration

4.3.1 *Sapphire* case

The award made in the *Sapphire* case was the first award to give full support to the application of international law and exclude the municipal law of the host country. In this case, a dispute arose from an oil concession agreement between Sapphire and the National Iranian Oil Company, which was a state agent of the Iranian Government. There was no express choice of law clause in the contract. However, a choice of law clause was found in the similar concession agreements previously made by the National Iranian Oil Company as follows:

> "it [the agreement] shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles then by and in accordance with principles of law recognised by civilised nations in general, including such of those principles as may have been applied by international tribunals."[11]

The arbitrator, Mr. Cavin, decided that the substantive law applicable to the interpretation and performance of the concession agreement was the principles of law

---

[10] Lew, *Applicable Law*, (1986), at p. 403.

[11] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award made on March 15, 1963, 35 *I.L.R.* 136-192.

generally recognised by civilised nations. First, he denied that the parties had an intention to apply Iranian law to the agreement . Secondly, he stated that the parties could not be presumed to have agreed upon the choice of law by their common choice of the forum of the arbitration. As he said:

> "... in the view of some eminent specialists in Private International Law, since the arbitrator has been invested with his powers as a result of the common intention of the parties he is not bound by the rules of conflict in force at the forum of the arbitration. Contrary to a State judge , who is bound to conform to the conflict law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities. This consideration carries particular weight in the present case ... "[12]

Because the agreements offered *Sapphire* the rights of possession and, to a certain extent, control of the territory, the contract in dispute was regarded as one with a particular character, which partly existed in public law and partly in private law.[13] Thirdly, considering the decision in the *Lena Goldfield Arbitration,*[14] Mr. Cavin agreed that it would be more appropriate to call for the application of the general principles of law based upon reason and upon the common practice of civilised countries to decide the case. This has been expressly recognised in other cases.[15] As he observed:

> "..., a reference to rules of good faith, together with the absence of any reference to a national system of law, leads the judge to determine, according to the spirit of the agreement, what meaning he can reasonably give to a provision of the agreement which is in dispute. It is therefore perfectly legitimate to find in such a clause evidence of the intention of the parties not to apply the strict rules of a particular system but, rather, to rely upon the rules of law, based upon reason, which are common to civilised nations."[16]

---

[12]*Ibid.* at p. 170.
[13]*Ibid.* at p. 171.
[14]Discussed in *Cornell L.Q.* 36 (1950 - 51); 31, at pp. 36-37.
[15]Such as *Petroleum Developments Limited v. Ruler of Abu Dhabi,* (1951) 18 *I.L.R.* 141. and *Ruler of Qatar v. International Marine Oil Company Limited,* (1953) 20 *I.L.R.* 534.
[16]*Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award March 15, 1963, (1968) 35 *I.L.R.* 136, at p. 173.

Finally, with reference to Article 38 of the Statute of the International Court of Justice, Mr. Cavin decided that the application of the general principles of law to the contract was justified in this case where a State organ and a foreign company were involved.[17]

4.3.2 *ARAMCO* case

In the *ARAMCO* case, a dispute between the Kingdom of Saudi Arabia and the Arabian American Oil Company (Aramco) was submitted to an *ad hoc* arbitration held in Geneva in 1955. The facts of the case are as follows: in 1933, the Kingdom of Saudi Arabia granted an oil concession agreement, which gave Aramco an exclusive right to transport the oil extracted from the concession area. Nevertheless, in 1954, the Government of Saudi Arabia granted Mr. Onassis and his company, Saudi Arabian Maritime Tankers Ltd., the rights to transport Saudi Arabian oil for thirty years. The latter agreement was in conflict with the agreement which granted Aramco the right to transport the oil extracted from the concession area.

The arbitral tribunal decided that the choice of the applicable principles would be made by resorting to the world-wide custom and practice in the oil business and industry; failing such custom and practice, the Tribunal will be influenced by the world case-law and doctrine and by pure jurisprudence.[18] The tribunal addressed the issue of the proper law in the following terms:

> "public international law should be applied to the effects of the Concession, when objective reasons lead it to be concluded that certain matters cannot be governed by any rule of the municipal law of any State, as is the case in all matters relating to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations."[19]

---

[17] *Ibid.* at p. 175.
[18] *Saudi Arabia v. Arabian American Oil Company*, (1960) 27 *I.L.R.* 117, at p. 171.
[19] *Ibid.* at p. 172.

4.3.3 *British Petroleum (Libya) Ltd. v. The Government of the Libyan Arab Republic*

British Petroleum Company Ltd. v. The Government of the Libyan Arab Republic[20] was a case where the dispute arose from a nationalisation ordered by the Libyan Government. On December 18, 1957, Libya granted in a Deed of Concession, designated as Concession 65, to Mr. Hunt (a citizen of the United States) an exclusive right for 50 years to search for and extract petroleum within a designated area in the Sarir Desert of Libya. By an agreement dated June 24, 1960, Mr. Hunt assigned to BP an undivided one-half interest in Concession 65 and this was approved by the Libyan Government. Nevertheless, on December 7, 1970, Libya passed the Nationalisation Law (Law No. 115), which nationalised the operations of BP in Concession 65. On December 11, 1971, BP instituted arbitration against Libya.

A choice of proper law clause was found in Paragraph 7 of Clause 28 of the Concession, which provided:

> "This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."

In accordance with the clause, the arbitrator decided that "the provision generates practical difficulties in its implementation, it offers guidance in a negative sense by excluding the relevance of any single municipal legal system as such."[21] Therefore, the Tribunal should apply the clause according to its clear and apparent meaning to the extent possible.

---

[20] *British Petroleum Company Ltd. v. The Government of the Libyan Arab* Republic, (1979) 46 *I.L.R.* 297, also reprinted in (1980) V *Y.B.C.A.* 143.
[21] *Ibid.* at p. 327.

Meanwhile, BP made two submissions that the Concession should be governed by international law alone. First, BP maintained that the acceptance of a general principle must be supported by both Libyan and international law if they were to apply to the Concession. Therefore, if the conduct of a party to the Concession could not be justified by the principles of both Libyan law and international law, it was not justifiable under the Concession. In other words, the conduct was justifiable only when the principles of both systems of law - Libyan and international - supported it. Secondly, BP argued that, in this case, public international law should be the only system of law left since the parties had expressly excluded the direct and the sole application of Libyan law, and had made reference to the general principles of law.[22]

Nevertheless, both arguments were rejected by the arbitrator. In relation to BP's first submission, the arbitrator commented:

> "... since it entirely leaves out of the picture the direction which follows from paragraph 7 of Clause 28 that conduct etc. in the last analysis should be tested by reference to the general principles of law. It is not correct to say that "a principle must be supported by both Libyan law and international law in order to be justifiable under the concession" and that conduct "is justifiable only if principles of both systems of law - Libyan and international - support it". The principle may still be acceptable, and the conduct justifiable, if supported by the general principles of law."[23]

and,

> "... If a particular action by a party amounts to breach of contract under one system but not under the other, the issue is one which can only be decided by reference to the general principles of law. Thus, the first part of the Claimant's argument must be rejected. It is not sufficient for the Claimant to show that the conduct of the Respondent is a breach of international law as a basis for maintaining a claim based on breach of contract. In the event that international law and Libyan law conflict on that issue, the question is to be resolved by the application of the general principles of law."[24]

In relation to the second submission, the arbitrator stated:

---

[22] *Ibid.* at p. 328.
[23] *Ibid.*
[24] *Ibid.*

> "The Tribunal cannot accept the submission that public international law applies for paragraph 7 of Clause 28 does not so stipulate. Nor does the BP Concession itself constitute the sole source of law controlling the relationship between the Parties. The governing system of law is what that clause expressly provides, viz. in the absence of principles of law, including such of those principles as may have been applied by international tribunals."[25]

The arbitrator interpreted the choice of law clause as follows: (1) the law of Libya was the proper law of the concession, but only to the extent that it was consistent with the principles of international law; and (2) in the event of inconsistency between these two legal systems, the general principles of law would prevail. Nevertheless, the arbitrator stated that he was unable to find any principles of the Libyan law common to principles of international law pursuant to which the BP Concession would be valid and subsisting and the remedy of restitution available to the Claimant. Hence, in accordance with paragraph 7 of Clause 28, the Tribunal decided to consider the issue in the light of the general principles of law. Finally, the arbitrator decided that a nationalisation in breach of the concession agreement amounted to an illegality and, similar to a treaty, the foreign investment agreement should act as a fetter on the sovereignty of the host state while it was valid.

4.3.4 *TEXACO* case

As with other nationalisation disputes arising between the Libyan Government and foreign companies, the *TEXACO* arbitration dealt with another oil concession agreement. In this case[26], during the period between 1955 and 1968, fourteen Deeds of Concession were concluded between the Libyan Government and two American companies, the Texas Overseas Petroleum Company and the California Asiatic Oil Company. Similar to what had happened in the *BP* case, despite the concession

---

[25] *Ibid.* at p. 329.

[26] *Texaco Overseas Petroleum Co. / California Asiatic Co. v. Government of the Libyan Arab Republic*, 17 *I.L.M.* 3 (1978). (Award on the merits, Jan. 19, 1977; R. Depury was the sole arbitrator).

agreements, Libya unilaterally ordered nationalisation on September 1, 1974. After the dispute arose, the companies notified the Libyan Government that recourse had been made to arbitration in accordance with clause 28 of the Deeds of Concession.

After deciding that the arbitration procedures should be governed by public international law,[27] the arbitrator went on to discuss the issue of the proper law of the contract. On the issue concerning the proper law of the contract, the arbitrator referred to Clause 28. It reads :

> "This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."

This choice of law clause was interpreted as a 'two-tier system' by the arbitrator. He explained that, in accordance with this clause, the principles of Libyan law were applicable to the extent that such principles were common to the principles of international law, and, in the absence of such conformity, reference was made to general principles of law.[28]

Following such a conclusion, the arbitrator said that under a new concept, contracts between States and foreign private persons could be 'internationalised' in the sense of

---

[27]As far as the dispute about the law governing the arbitration is concerned, the arbitrator found sufficient reasons to adopt the solution used in the *Aramco*-case: as the arbitration was to take place outside the host country, the parties had intended to secure the guarantee of a neutral judge. Moreover, the jurisdictional immunity of States excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in arbitral proceedings. Under the principle of jurisdictional immunity of foreign States the arbitrator was unable to hold that one State could be subject to the law of another State. The arbitrator still had other reasons for holding international law to govern the arbitration. One of these was the provision in clause 28 to the effect that, failing agreement of the parties, the President of the ICJ should appoint the arbitrator. Furthermore, the Rules of Procedure, adopted by the arbitrator in the first hearing on February 24, 1975, declared in Art. 1, para. 2, after having fixed in para. 1 Geneva as the seat of the arbitral tribunal, that "the arbitration shall be governed by these Rules of Procedure to the exclusion of local law."

[28]*Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, 17 *I.L.M.* 3 (1978), at p. 11. Reprinted in (1979) IX *Y.B.C.A.* 177.

being subjected to public international law. Therefore, under certain conditions, the arbitrator could regard contracts between States and private individuals as coming within the ambit of a particular and new branch of international law - the international law of contracts.[29]

Accordingly, the arbitrators not only chose international law as the proper law but also referred to international law as a means of empowering them to choose this two-tier system. Particularly, the application of the principles of Libyan law did not rule out the application of the principles of international law. In fact, it was a combination of these two laws in verifying the conformity of the Libyan law with international law. As he explained in the following terms:

> "In the present dispute, general principles of law have a subsidiary role in the governing law clause and apply in the case of lack of conformity between the principles of Libyan law and the principles of international law; ... Now, these principles of international law must, in the present case, be the standard for the application of Libyan law since it is only if Libyan law is in conformity with international law that it should be applied. Therefore, the reference that is made mainly to the principles of international law and secondarily, to the general principles of law must have as a consequence the application of international law to the legal relations between the parties."[30]

Finally, after consulting the principles of international law and the nature of the contract, the arbitrator stated that the contract involved was internationalised and governed by the general principles of law.

4.3.5 *LIAMCO* case

The third case involving a dispute arising from an oil concession agreement between the Libyan Government and a foreign investor is *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*.[31] On September 1, 1969,

---

[29] *Ibid.* at p. 13.
[30] *Ibid.* at p. 15.
[31] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1982) 62 *I.L.R.* 140. Also reprinted in (1981) VI *Y.B.C.A.* 89.

the Libyan Government nationalised 51% of the concession rights of a number of companies including LIAMCO. Later, the remaining 49% of the LIAMCO concession was also nationalised. After the second nationalisation, LIAMCO referred the dispute to arbitration.

A choice of law clause was found in Clause 28 para 7 of the concession agreement, which read: "This concession shall be governed and interpreted in accordance with the principles of law of Libya common to the principles of international law, and in the absence of such common principles then by and in accordance with the general principles of law as may have been applied by international tribunals."

In the arbitral award, the arbitrator considered the choice of law contained in Clause 28, para 7 of the *LIAMCO* Concession Agreement valid and stated that "it is an accepted universal principle of both domestic and international laws that the parties to a mixed public and private contract are free to select in their contract the law to govern their contractual relationship." Furthermore, the arbitrator analysed the choice of law clause by stating:

> "The proper law governing LIAMCO's concession agreement as set forth in the amended version of said Clause 28, para 7, is in the first place the law of Libya when consistent with international law, and subsidiarily the general principles of law. Hence, the principal proper law of the contract in said Concessions is Libyan domestic law. But it is specified in the Agreements that this covers only "the principles of law of Libya common to the principles of international law." Thus, it excludes any part of Libyan law that is in conflict with the principles of international law."[32]

In relation to the argument that the application of international law might contradict Libyan law, the arbitrator commented:

> "It is relevant to note that the other subsidiary legal sources mentioned in said Art. 1 of the Libyan Civil Code, namely custom and natural law and equity, are also in harmony with the Islamic legal system itself. As a matter of fact, in

[32] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1982) 62 *I.L.R.* 140, at p. 173.

> the absence of contrary legal text based on the Holy Koran or the Traditions of the Prophet, Islamic law considers custom as a source of law and as complementary to and explanatory of the contents of contracts, especially in commercial transactions."[33]

Moreover,

> "It is very relevant in this connection to point out that Islamic law treats international law as an imperative compendium forming part of the general positive law, and that the principles of that part are very similar to those adopted by modern international legal theory.
> Thus it has been pointed out that Libyan law in general and Islamic law in particular have common rules and principles with international law, and provide for the application of custom and equity as subsidiary sources."
> ...
> These general principles are usually embodied in most recognised legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. They are applied by municipal courts and are mainly referred to international and arbitral case-law."[34]

Finally, the arbitrator concluded that the Concession agreements were governed by, in the first place, the law of Libya when consistent with international law, and subsequently, the general principles of law.

4.3.6 *AMINOIL* case[35]

This case involved a dispute arising from a concession agreement between Aminoil and the Kuwaiti government. Aminoil was granted a Concession by the Rulers of Kuwait for the exploration of petroleum and natural gas in the Kuwait "Neutral Zone" in 1948. However, on September 19, 1977, the Government of Kuwait issued Decree Law No. 124 to terminate the concession agreement between the parties. All assets and interests of the Company were nationalised by Kuwait. Article III of the concession agreement contained a choice of law clause. As far as the substantive law was concerned, Article III (2) of the agreement provided:

---

[33] *Ibid.* at p. 174. Reprinted in (1981) VI *Y.B.C.A.* 89, at pp. 93-94.
[34] *Ibid.* at p. 175; and (1981) VI *Y.B.C.A.* at p. 94.
[35] *The American Independent Oil Company Inc. (AMINOIL) v. The Government of the State of Kuwait International*, 21 *I.L.M.* 976 (1982). Reprinted in (1984) IX *Y.B.C.A.* 71.

> "The law governing the substantive issues between the parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."

The arbitrator commented on the choice of law clause and stated that Article III (2):

> "makes it clear that Kuwait is a sovereign state entrusted with the interests of a national community, the law of which constitutes an essential part of intra-community relations with the state. At the same time, by referring to the transnational character of relations with the concessionaire, and to the general principles of law, this Article brings out the wealth and fertility of the set of legal rules that the Tribunal is called upon to apply."[36]

The arbitrator also stressed that the different sources of law to be applied in this case were not contradictory with each other; he said:

> "The different sources of the law thus to be applied are not - at least in the present case - in contradiction with one another. Indeed if, as recalled above, international law constitutes an integral part of the law of Kuwait, the general principles of law correspondingly recognise the rights of the State in its capacity of supreme protector the general interest. If the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of their resources, and encouraging their trend towards unification, that the future of a truly international economic order in the investment field will depend."[37]

4.3.7 *SPP* case[38]

This case involved a dispute arising from a construction agreement in relation to a tourist village made between SPP, the Ministry of Tourism of Egypt and EGOTH. This agreement was followed by a second agreement on December 12, 1974, between EGOTH and SPP. The words of "approved, agreed and ratified by the Minister of Tourism" and the signature of the Minister appeared on the agreement. However, the project was objected to by the People's Assembly at a later stage. The project was

[36] *Ibid.* at p. 1001.

[37] *Ibid.* Reprinted in (1984) IX *Y.B.C.A.* 71, at pp. 72.

[38] *SPP (Middle East) Ltd., Hong Kong and Southern Pacific Properties Ltd., Hong Kong v. Arab Republic of Egypt and The Egyptian General Company for Tourism and Hotels*, ICC case no. 3493, made on February 16, 1983; the facts and the award were published in 22 *I.L.M.* 752 (1983). The challenge was published in 23 *I.L.M.* 1048 (1984). Reprinted in (1984) IX *Y.B.C.A.* 111, at pp. 116-118.

eventually cancelled by several Decrees issued by the Government. An arbitration clause was found in the second agreement. In accordance with the arbitration clause, SPP initiated the arbitration in ICC. With respect to the issue of the proper law, the arbitral tribunal stated:

> "The Agreements do not provide specially for the law which is to govern the contract. The parties have fully debated this issue coming to conclusions which only partially diverge. They both agree that in view of the circumstances of the case the relevant domestic law is that of Egypt. The Claimants, however, contend that no rules and/or principles drawn from the body of domestic Egyptian law should be allowed to override the principles of international law applicable to international investment projects of this kind."

The arbitral tribunal affirmed the idea that a state and a private person to a state contract can be removed, to a certain extent, from the jurisdiction of the domestic law and be subject to international rules.[39] Regarding the issue of the proper law, the tribunal decided that the Egyptian law was the governing law but within the scope of the general principles of international law. After considering the opinions of some Egyptian law specialists, the tribunal found that the Egyptian law must be construed so as to include such principles of international law as may be applicable. Moreover, the national laws of Egypt can be relied upon only in as much as they do not contravene the principles of international law. While being required to take the provisions of the contract and the relevant trade usages into account, the tribunal stated:

> "International Law Principles such as '*Pacta Sunt Servanda*' and '*Just compensation for expropriatory measures*' can be deemed as part of Egyptian Law. The adherence to the ICSID Convention should then be treated as conclusive evidence of Egypt's declared intent to abide by these principles, which indeed represent the basic philosophy adopted by the Convention's drafters."[40]

4.4 The application of the general principles of law in the ICSID and the Iran-United States Arbitral Claims Tribunal

[39] *Ibid.* 22 *I.L.M.* 752 (1983) at p. 769.
[40] *Ibid.* at p. 771.

It is not only *ad hoc* arbitrations but also some international arbitration institutions reveal a positive attitude towards the application of the general principles of law to govern the substantive disputes arising from international investment contracts. In this section of the chapter, there will be a discussion of the application of the general principles of law in the International Centre for Settlement of Investment Disputes (ICSID) and the Iran-United States Claims Tribunal.

4.4.1 The ICSID Arbitration

ICSID was established by the Washington Convention of 1965 to settle the investment disputes arising from investment contracts between a contracting state and a national of another contracting state. In relation to procedural law, an ICSID arbitration is governed by international law. With respect to the choice of the proper law, influenced by the view that international law derived from Article 38 of the Statute of International Court of Justice[41] is sufficiently complete to provide a legal answer to every dispute,[42] ICSID has a positive attitude towards the application of the general principles of law to the substantive issues. In the field of international investment, the issue of the choice of proper law has been expressly dealt with in the second sentence of Article 42(1) of the ICSID Convention, which reads as follows:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party of the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[43]

---

[41]Accordingly, the sources of international law include international conventions, international custom, general principles of law and judicial decisions and teachings of international law experts.
[42]Shihata and Parra, "Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention" 9 *ICSID Rev.* 183 (1994), at p. 194.
[43]Although it is argued that the specific proviso of Art. 42 should only apply to investment agreements and disputes that arise thereunder. However, some commentators have a more relaxed attitude to it. For instance, Delaume, in "State Contracts and Transnational Arbitration", *Am.J.Int.Law* 786 (1981), said: "in the world today, there is no reason why this solution should be limited to a particular category of state contracts. In other words, the rule formulated in Art. 42 can be considered as illustrative of a principle of wider application."

Under the ICSID Convention, arbitrators are required to apply the law of the State party to the dispute or the law of other country as the State party's conflict of laws so indicate, in combination with international law. The rules of international law are mainly applied in two ways. In some cases, the application of national law of the host state is chosen and supplemented by any principles of international law,[44] whereas in other cases, parties agreed on the application of international law rules, with the law of host state playing a supplementary role.[45] Accordingly, examples of application of host State law together with international law to resolve the disputes arising from investment agreement could be seen in a number of cases brought to ICSID.[46]

For instance, in *Amco Asia* case,[47] a dispute arose from a Lease of Management agreement concluded between Amco Asia, a US corporation, and PT Wisma (a state agent of the Indonesian Government) in 1968. According to this Lease, Amco Asia was supposed to complete the construction of the Kartika Plaza Hotel in Indonesia. Later, Amco Asia applied to the Government of Indonesia to establish PT Amco, a subsidiary established under Indonesian law. However, disputes arose between PT Amco and PT Wisma, particularly concerning the amounts due to the respective parties under the Profit-Sharing Agreement. Eventually, on 31 March and 1 April 1980, the hotel was allegedly seized in an armed military exercise and the management was effectively taken over by PT Wisma. On 15 January 1981, Amco filed a request for arbitration with ICSID.

---

[44]Such as *AGIP S.p.A. v. Government of People's Republic of the Congo*, ICSID Case No. ARB/77/1; 1 *ICSID Rep.* 306 (1993), at pp. 313, 318.

[45]Such as *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/87/3; 6 *ICSID Rev.* 526, 533-34 (1991).

[46]Such as *Kaiser Bauxite Company v. Government of Jamaica*, ICSID Case No. ARB/74/3; 1 *ICSID Rep.* 296, 301 (1993) where the law of Jamaica and such rules of international law were applicable to the dispute. For the cases decided *ex aequo et bono*, see *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea,* ICSID Case No. ARB/84/1; *Tescro Petroleum Corporation v. Government of Trinidad and Tobago,* ICSID Case No. CONC/83/1; 1 *ICSID Rev.* 340, 344 (1986).

[47]*Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia, ad hoc* Committee Decision of May 16, 1986, 1 *ICSID Rep* 509 (1993) and 25 *I.L.M.* 1441 (1986). Reprinted in (1992) XVII *Y.B.C.A.* 73.

In relation to the law applicable to the substance of the dispute, the parties failed to agree on any laws to govern their relations. The *ad hoc* Committee considered Art. 42 of the Convention as an indication of the proper law and regarded itself as being authorised by the parties "to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms."[48] Furthermore, the tribunal stressed the supplemental and corrective role of international law under Article 42(1) of the Convention, by stating:

> "If there are no relevant national laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as 'only' 'supplementary and corrective' seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law."[49]

A similar attitude could also be seen in the case of *Revere Copper & Brass, Inc. (RJA) v. Overseas Investment Corps (OPIC).*[50] In this case, the investment was made according to an agreement between the Government of Jamaica and RJA, dated March 10, 1967. The agreement provided, *inter alia*, that it would remain in force for 25 years and that no further taxes or levies, except as stated, would be imposed upon RJA. Also, no obligation would be placed on RJA that would derogate from its right to own and operate the property held in connection with the project. Despite this provision, the Government of Jamaica later imposed a 'bauxite levy' on RJA's production and significantly increased the rate of royalties payable by RJA. RJA decided to submit the dispute to arbitration.

The majority of the tribunal decided the case in Revere's favour. As far as the proper law of the contract was concerned, they decided that the law of Jamaica was not the

---

[48] *Ibid.* at p. 76.
[49] *Ibid.*
[50] 17 *I.L.M.* 1321 (1978), also see Joy, "Arbitration Economic Development Agreement: the Impact of *Revere v. OPIC*," 20 *Virginia J.Intl.L.* 861 (1980).

only law to be taken into account, even though the agreement was silent on the issue of applicable law. As the tribunal stated:

> "Although the Agreement was silent as to the applicable law, we accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes precludes the responsibility of States for injuries to aliens."[51]

On the issue of breach of long term investment agreement, it was the tribunal's opinion that it was not subject to a municipal law, but had to be determined in the light of international law:

> "In such cases, the question of breach is not left to the determination of municipal courts applying municipal law. The reason for this is that such contracts, while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries.

Therefore,

> "A majority of the Panel has concluded that the 1967 Agreement falls within this category of a long term economic development agreement and the principles of public international law apply to it insofar as the government party is concerned and therefore that the question of breach by such party cannot be determined solely by municipal law."

4.4.2. Iran-United States Arbitral Claims Tribunal

Apart from the ICSID, the Iran-United States Arbitral Claims Tribunal[52] is another arbitration institution which frequently applies international law as the proper law to state contracts in the absence of the choice made by the parties. The Tribunal was established in return for the release of Iranian assets frozen in the United States by court orders after arrangements were made to release the American hostages held in Iran in January 1981.[53]

---

[51] 17 *I.L.M.* 1321 (1978), at 1331.

[52] This Tribunal was established under the arrangement made between the United States and Iran concerning the release of American hostages held in Iran in return for Iranian assets frozen in the United State by court orders.

[53] The Algiers Declarations of January 19, 1981 is reprinted in (1982) VII *Y.B.C.A.* 256.

Corresponding with Article V of the Claims Settlement Declaration, paragraph 1 of Article 33 of Iran-US Claims Tribunal Consolidated Tribunal Rules of Procedures establishes a range of possibilities to determine the governing law of the contract. In accordance with Article V, while taking the relevant usages of the trade, contract provisions and changed circumstances into account, the tribunal is required to apply "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable,"[54] to determine the proper law of the contract. According to this provision, it is not compulsory for the Tribunal to apply the conflict of laws rules of the place of arbitration to decide the proper law. Because of the particularities of the disputes submitted to the Tribunal, arbitrators prefer to apply the general principles of law to decide the disputes, rather than refer to the national systems of law.

In an *ad hoc* arbitration, *Elf Aquitaine Iran v. National Iranian Oil Company*,[55] where a dispute arose from an oil exploration and production contract between National Iranian Oil Company (NIECE) and Elf Aquitaine Iran, a choice of law clause was found in the arbitration clause incorporated in Art. 41 of the agreement of 1966. It stated :

> "the Arbitration Board or the sole arbitrator in arriving at the award, shall in no way be restricted by any specific rule of law, but shall have the power to base his award on considerations of equity and generally recognised principles of law and in particular International Law."

The arbitrator affirmed the theory of party autonomy which gave the parties the power to choose the proper law they desired by saying:

> "The choice of law clause in the agreement between NIOC and ELF cannot be criticised on the ground that it deviated from the law indicated by general rules on conflicts of laws without good reason. The law chosen in the agreement as the competent law coincides with the law that, in the absence of the choice of law clause, would have been the proper law of the agreement."

---

[54]Paragraph 1 of Article 33 of Iran-US Claims Tribunal Consolidated Tribunal Rules of Procedure.
[55]*Ad hoc* award made on January 14, 1982; Reprinted in (1986) XI *Y.B.C.A.* 97,. at p. 99-101.

Moreover, following the trend, the arbitrator agreed that there was a "need for placing international contracts under an autonomous legal system founded on international law and independent of the national laws of the parties."[56] Finally, the arbitrator concluded that the substantive law governing the agreement and the rights and obligations of the parties was the law chosen by the parties, that is, the general principles of law recognised by civilised nations.[57]

The general principles of law has also been applied in *Oil Field of Texas* case,[58] which rejected the Iranian Government's arguments about the necessity of applying the Iranian law to determine the issue, the Tribunal emphasised the needs to apply the general principles of law or the principles of international law to this case by stating that "The controlling rules have therefore to be derived from principles of international law applicable in analogous circumstances or from general principles of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered."[59]

---

[56]For example, McNair, "The General Principles of Law Recognised by Civilised Nations", (1957) 1 *Brit.Yrbk.Intl.L.* 1 and Bourquin, "Arbitration and Development Agreements" *Bus.Law.* 860 (1960).

[57]In addition, according to the recognised principles of international law, the arbitrator disagreed that the state party had the freedom to change the *lex contractus* by subsequent legislation. *Ad hoc* award made on January 14, 1982; reprinted in (1986) XI *Y.B.C.A.* 97, at p. 99-101.

[58]*Oil Field of Texas Inc., v. The Government of Iran,* award no. ITL 10-43-FT, 1 Iran-US CTR 347, (Dec. 9, 1982). Also see *Esphahanian v. Bank of Tejarat.*2 Iran-US CTR 157 (1983 I), summarised in 77 *Am.J.Int.Law* 646 (1983).

[59]*Ibid.* at pp. 361-362. Once again, the general principles of law was applied in the case of *Esphahanian v. Bank of Tejarat* 2 Iran-US CTR 157 (1983 I) , summarised in 77 *Am.J.Int.Law* 646 (1983), where the Tribunal applied the "dominant and effective nationality" test, stipulated in Article 31 (3) (c) of the Vienna Convention, to decide the jurisdiction of the Tribunal.

Chapter Five

The application of the new *lex mercatoria* as the proper law of the contract in international commercial arbitration

The term the "new *lex mercatoria*" was first used by Professor Schmitthoff. He suggested that the sources of this body of principles can be found in (a) international rules of commerce; (b) applicable state law; and (c) trade usages in each branch of commerce.[1] Influenced by this invocation, the new *lex mercatoria* has frequently been chosen to be the proper law governing the substantive disputes between parties, particularly in the European Continent.[2]

Analysis of arbitral awards made during the past twenty years shows that a substantial number were made on the basis of the new *lex mercatoria*. The choice of the new *lex mercatoria* can be made in two ways: either by the parties' express choice provided in the choice of law clause in the arbitration agreement or in the contract, or by the arbitrator's decision in the absence of express choice from the parties.

With increasing international commercial activities conducted between parties from different countries, the need for fair and suitable norms has increased.[3] Under these circumstances, the practice of applying the new *lex mercatoria* has been invoked by

---

[1] Schmitthoff, "The Unification of the Law of International Trade", in Schmitthoff's *Select Essays on International Trade Law*, at p. 170. (Cheng ed. 1988).

[2] According to Mr. Lando, the arbitrators from Europe more frequently apply the *lex mercatoria* to the dispute arising from international contracts than those from other countries, especially, the disputes arising from contracts between a government or government enterprise and a private company. With the fear of potential bias, the private party will not wish to have the dispute governed by the laws of the foreign government, and *vice versa*. Besides the state contracts, this application is also very popular among the private enterprises engaged in international trade. The application of the *lex mercatoria* in an international contract as the proper law has been generally accepted in Austria and France.

[3] Randall, and Norris, "A New Paradigm for International Business Transactions", 71 *Wash.U.L.Q.* 599 (1993), at pp. 607-608.

some scholars. They have suggested that the national law regimes and the conventional choice of law rules to find the proper law of the contract within the scope of national laws should be modified.

In their opinion, in the absence of an express choice of law, the traditional choice of law rules appear to be inadequate to provide certainty for international business people to predict which law will govern the disputes between them. As a result of this, after the choice of law has been decided, the business people may be forced to have their contract governed by a law they never expected, or they may be disadvantaged by their lack of language skills or difficulty in discovering the relevant regulations of the applicable laws. As a writer commented: "It is sometimes suggested, however, that this search for the proper law is out of touch with the realities of international trade; and that what is needed is not a particular national system of law, but a modern law merchant."[4]

Secondly, the proponents of the new *lex mercatoria* point out the inadequacy of municipal laws in coping with the complexities of disputes arising from international commerce. They maintain that municipal laws are inadequate for the needs of international trade because the legislative mechanism of states has demonstrated slow progress in amending the laws to cope with the fast development of international commerce. Even if a state is capable of catching up with the fast changes of commerce, the question is how far and how fast a society can afford to change its domestic legislation in order to cope with the rapidly expanding development of economic life.[5]

---

[4]Redfern and Hunter, *International Commercial Arbitration*, (2nd ed. 1991), at p. 117.

[5]Goldstajn, "The New Law Merchant Reconsidered", in Schmitthoff, (ed.) *Commercial Law in a Changing Economic Climate*, (1981), at p. 175.

Recognising that keeping the commercial laws up-to-date and developing unified international rules can be beneficial to the development of international commercial arbitration, some jurists and merchants believe that it would be desirable to develop a set of universal rules to be applied to all international commercial activities world-wide. Responding to these demands, the concept of the new *lex mercatoria* has been invoked and has attracted a great deal of attention because it is regarded as a device which meets the real needs of the international commercial communities.

This chapter is an investigation of the application of the new *lex mercatoria* as the proper law of international contracts in international commercial arbitration. The chapter contains four sections. The first section will explore the history of the new *lex mercatoria*, with a special emphasis on the difference between the *lex mercatoria* and the new *lex mercatoria* (as used in this work). It will be followed in the second section by a discussion of the various definitions of the term the "new *lex mercatoria*". The third section of this chapter will present the opinions for and against the application of the new *lex mercatoria* in international commercial arbitration. Finally, this chapter will conclude with an examination of the adoption of the new *lex mercatoria* in international convention and international arbitral awards.

5.1 The history of the new *lex mercatoria*

In Europe, it is commonly agreed that the history of the new *lex mercatoria* is not a continuous one but composed of three individual periods; namely the Roman *ius gentium*, the medieval *lex mercatoria* and the new *lex mercatoria*. The origin of the new *lex mercatoria* can be traced back to as early as 300 BC and the Sea Laws of Rhodes.[6] They were adopted by the Greeks and later the Romans. It was

[6]Berman and Kaufmann, "The Law of International Commercial Transactions", *Harv.Intl.L.J.* 221 (1978), at p. 224.

incorporated into the Roman *ius gentium.* However, this ancient customary mercantile law was referred to as the *lex mercatoria* at that time. Following the demise of the Roman Empire, only a few rules of the mercantile law remained.[7] In the ninth century AD, the *lex mercatoria* was again developed by Eastern Emperor Basil I, in the Island of Rhodes. Later, between the eleventh and the twelfth centuries, the famous Rolls of Oleron were produced by the Court of Oleron.[8] Then, the Wisby[9] laws gained authority in the Baltic Sea after being enacted around 1350. At the same time, the *Consolato del Mare*[10] became accepted in the commercial centres in the Mediterranean.[11]

Parallel with this development, a large body of laws governing trade conducted across the different markets and ports involved in the Middle Ages. This body of maritime law developed for maritime trade emerged mainly along the major trading routes between northern Italy, the Champaigne, Flanders and the southern part of England. At this time, the *lex mercatoria* based on the notion of good faith was widely accepted among the merchants. Accordingly, the merchants had their own laws and legal system which were distinct from the laws applicable in their respective states.

The commercial usages, the *lex mercatoria*, that had developed since 300 BC were confirmed by the mercantile courts composed of the merchant class. As far as the merchants were concerned, these courts satisfied their needs. Moreover, the local rulers were not against the application of the *lex mercatoria*, despite the fact that it was detached from the local legal systems. From the jurist's point of view, the *lex*

---

[7]The remaining rules from the Roman period primarily appeared in Lombard and Venetian law in the eleventh and twelfth century.

[8]In the middle of the 12th century the Rolls of Oleron were produced in the Oleron which is an island off the French Atlantic coast.

[9]In some materials, it is referred to as Visby Rules.

[10]It is a collection of maritime customs laid down in the Consular Court of Barcelona.

[11]Tarkmann, "The Evolution of the Law Merchant", 12 *J.Mar.L. & Com.* 1 (1980/81), at p. 4., and, Stoecker, "The *Lex Mercatoria*: To What Extent Does It Exist?", (1990) 7(1) *J.I.A.* 101 at p. 102.

mercatoria was a body of truly international customary rules governing the cosmopolitan community of international merchants while the philosophy of *laissez-faire* provided the basis for it. After all, the *lex mercatoria* was widely applied among the merchants in Europe at that time.

From the seventeenth century onwards, with the universal acceptance of the idea of national sovereignty, the *lex mercatoria* once again disappeared from the international merchant community. However, this time, the *lex mercatoria* did not disappear into history, but was absorbed into most European municipal legal systems.[12] This development could be seen both in England, where Lord Mansfield started to amalgamate the rules of the *lex mercatoria* with those of the common law[13] and the civil law countries where a broad codification incorporating the *lex mercatoria* took place.[14]

Through the nineteenth century, and particularly after World War II, due to the enormous rise of global trade and the strong demands for a unified business law, the *lex mercatoria* made another appearance in the history. However, some commentators call it the "new *lex mercatoria*" to avoid confusion with the *lex mercatoria* which prevailed during the Roman period and the Middle Ages. As illustrated by Professor Schmitthoff:

> "the modern law of international trade is different in character from the mediaeval law merchant because the mediaeval law merchant was essentially the universally accepted practice and usage... of the merchants; ... the modern law of international trade ... is not international law in the sense in which that term is used in the law of nations ..., it is applied in the municipal jurisdiction

---

[12] *Ibid.* See also Stoecker, at p. 103.

[13] Discussed in Burdick, "What is the Law Merchant"? 2 *Colum.L.R.* 470 (1902), at p. 482; H. Berman, *Law and Revolution, the Formation of the Western Legal Tradition*, (1983), 241; Sack, *Conflicts of Laws in the History of the English Law in Law, A Century of Progress*, 1835-1935 III, at pp. 342, 376-377 (1937).

[14] von Caemmereer in Schmitthoff (ed.) *Sources of the Law of International Trade*, 71 (1964).

by authority of the national sovereign but its sources are of international character."[15]

Although such an autonomous view is not shared by all jurists, it has influenced the general view that the new *lex mercatoria* is a distinct norm from the *lex mercatoria* applied during the medieval time. Furthermore, following the supports of international concept of commercial law, the emergence of the new *lex mercatoria* tends to develop into an autonomous international business law, that is, a law with a universal character that attempts to shed the national peculiarities of municipal laws.[16]

5.2 Definition of the new *lex mercatoria*

Since no codified rules are provided, different definitions have been suggested in legal literature on this subject.[17] Primarily, these various definitions can be categorised as two different types. One is autonomism which regards the new *lex mercatoria* as an autonomous body of law which is self-contained and independent from any national legal system. The other group supports the idea of positivism that the new *lex mercatoria* is supplementary to the national law and the conflict of laws rules.

As far as autonomism is concerned, Professors Berman, Goldman and Fouchard are the scholars often associated with the idea that the new *lex mercatoria* is a self-contained autonomous body of law. Professor Berman believes that the new *lex mercatoria* is completely disconnected to any municipal legal system. In his opinion, the new *lex mercatoria* is a body of autonomous law for international commercial

---

[15] Schmitthoff, "The Unification of the Law of International Trade", (1968) *J.Bus.L.* at pp. 108-109.

[16] Goldstajn, "International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law - I", in Schmitthoff (ed.), *The Sources of the Law of International Trade - with special reference to East-West Trade*, (1964), p. 106.

[17] Stoecker, "The *Lex Mercatoria:* to What Extent Does It Exist?", (1990) 7(1) *J.I.A.* 101, at pp. 105-106.

transactions based upon the rule-creating power of the mercantile community. In addition, the new *lex mercatoria* is a principal source of the law governing export and import transactions which is founded on the universal practice of international business and on the common sense of business people in all parts of the globe; therefore, it should be regarded as binding upon national courts.[18]

Apart from Professor Berman, a number of jurists also share the same view. For instance, according to Professor Goldman, the new *lex mercatoria* is a collection of general principles and customary legal rules,[19] which are spontaneously created by the merchant community within the framework of international trade; furthermore, the new *lex mercatoria* can fulfil the functions of a legal system or even serve alternative choice-of-law theory[20] without reference to a particular national system of law.[21]

Again, other jurists define the new *lex mercatoria* as:

> "An international body of law, founded on commercial understandings and contract practices of an international community composed principally of mercantile, shipping, insurance and banking enterprises of all countries."[22]
>
> "The body of rules governing commercial relationships of a private law nature involving different countries."[23]
>
> "The customs of the business community may combine all general principles of law to create a principle of commercial self-determination."[24]

---

[18]Berman, *Law and Revolution, the Formation of the Western Legal Tradition*, (1983) at p. 302.

[19]Goldman, *Lex Mercatoria* (Forum Internationale 1983) at p. 6. Also see Berger, *International Economic Arbitration*, Vol. 9, (1993), at pp. 526-527.

[20]Goldman and Fouchard believe that this choice of law theory allows the application of the new *lex mercatoria* as a legal system, as a result, the national laws are excluded.

[21]Goldman, "The Applicable Law: General Principles of the Law - the *Lex Mercatoria*", in Lew (ed.) *Contemporary Problems in International Arbitration*, (1986), at p. 116.

[22]Berman and Kaufmann, "The Law of International Commercial Transactions", *Harv.Int'l.L.J.* 221 (1978), at p. 273.

[23]Goldstajn, "The New Law Merchant", in *Festschrift fuer Clive Schmitthoff*, (1973), at p. 171.

[24]Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration*, (1986), para. 35.02.

This autonomous definition caused controversy and a group of positivists have taken a different view on this issue. This group of scholars deny the idea that the new *lex mercatoria* is a self-contained system. They believe that the new *lex mercatoria* plays a supplementary role to the national law and the conflict of laws rules. It is only valid as far as it is expressly adopted by the individual state.[25] Professor Schmitthoff is one of the jurists associated with this view. According to him, the new *lex mercatoria* is a group of "Common principles in the law relating to international commercial transactions"[26] and "uniform rules accepted in all countries",[27] furthermore, the sources of the new *lex mercatoria* are the international legislation and international customs which are formulated by an international agency and adopted by the parties to the contract.

Another supporter of the positivism of the new *lex mercatoria* is Professor Lowenfield, who said:

> "My concept of *lex mercatoria*, is not that of a self-contained system covering all aspects of international commercial law to the exclusion of national law, but rather as a source of law made up of custom, practice, convention, precedent, and many national laws. Thus *lex mercatoria* as I see it can furnish an alternative to a conflict of laws search which is often artificial and inconclusive, and a way out of applying rules that are inconsistent with the needs and usages of international commerce and that were adopted by individual states with internal, not international, transactions in mind."[28]

> In addition, Professor Lando is another advocate for the supplementary role of the new *lex mercatoria*. He defines the new *lex mercatoria* as the "Rules of law which are common to all or most of the States engaged in international trade or to those States that are connected with the dispute, and if not

---

[25] Schmitthoff, "The Unification of the Law of International Trade", in Cheng ed. (1988) *Schmitthoff's Select Essays on International Trade Law*, (1964) 170, at pp. 171-172; also Schmitthoff, "Nature and Evolution of the Transnational Law of Commercial Transactions" in *The Transnational Law of International Commercial Transactions* 19, at pp. 23-24 (Horn & Schmitthoff, ed. 1982).

[26] Schmitthoff, "Nature and Evolution of the Transnational Law of Commercial Transactions", in Schmitthiff and Horn (ed.) *The Transnational Law of International Commercial Transactions*, (1982), at p. 19.

[27] Schmitthoff, *Commercial Law in A Changing Economic Climate*, (2nd 1981), at p. 20.

[28] Lowenfield, "*Lex Mercatoria*: An Arbitrator's View", (1990) 6(2) *Arbitration Int.* 145.

> ascertainable, then the rules which appear to be the most appropriate and equitable,"[29]

This view is also held by Mr. Langen, who suggests that the new *lex mercatoria* is "The rules of the game of international trade,"[30] and the collection of all these rules are stipulated "in the same or a similar way for a given concrete legal situation in two or more spheres of national jurisdiction."[31]

Additionally, Professor Goldstâjn proposes a rather broad definition of the new *lex mercatoria*, which includes custom and other rules that do not necessarily reflect business conduct, as he explained:

> "Usages of trade constitute the most important part of the *lex mercatoria*. National laws and multilateral conventions explicitly emphasised usages of trade. This, however, does not exhaust the content of *lex mercatoria*. Along with usages of trade, all other phenomenal forms of business practice must be taken into account, ... commercial practices in international trade in general, and, in particular, general conditions, standard clauses, standard contracts as well as general principles of law and codes of conduct which have recently been drafted with the intention of contributing to the formation of fair-play rules."[32]

Despite all the different suggestions concerning the definition of the new *lex mercatoria,* unfortunately no one definition is recognised and accepted universally. Under these circumstances, the reality of the new *lex mercatoria* can be seen in one of Professor Lando's speeches, as he said:

> "An arbitrator applying the *lex mercatoria* will act as an inventor more often than one who applies national law. Faced with the restricted legal material which the law merchant offers, he must often seek guidance elsewhere. His main source is the various legal systems. Applying the *lex mercatoria*, arbitrators may take advantage of their freedom to select the better rule of law which courts sometimes miss."[33]

---

[29] Lando, "The *Lex Mercatoria* in International Commercial Arbitration", (1985) *I.C.L.Q.* 747 at p. 747.

[30] Langen, *Transnational Commercial Law,* (1973) at p. 21.

[31] *Ibid.* at p. 33.

[32] Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN,* (1980), pp. 71-72.

[33] Lando, "The *Lex Mercatoria* in International Commercial Arbitration", (1985) *I.C.L.Q.* 747.

Because of its ambiguous nature, the new *lex mercatoria* has been debated over a few decades. In the next section of the study, opinions for and against the application of the new *lex mercatoria* will be highlighted.

5.3 The opinions for and against the application of the new *lex mercatoria*

While a definition of the new *lex mercatoria* has been discussed, a group of international practitioners, such as Mann,[34] Mustill,[35] Delaume,[36] and Boyd,[37] have expressed some doubts as to the practical usefulness of the new *lex mercatoria.*[38] They oppose the concept of the new *lex mercatoria* for its lack of precision and predictability, failing to meet the requirement of law and lacking in precedent.

First, in their opinion, the new *lex mercatoria* is not comprehensive enough to resolve the complicated disputes arising from international commercial transactions. Although the sources and the rules of the new *lex mercatoria* have been suggested by some jurists, there has been no consistent and systematic research allowing the practitioners

---

[34]Mann, "England Rejects 'Delocalised' Contracts and Arbitration", (1984) 33 *I.C.L.Q.* 193, at pp. 196-197; "Private Arbitration and Public Policy", (1985) 4 *Civil Just.Q.* 257, at p. 264; "*Lex Facit Arbitrum*", in *Liber Amicorum for Martin Domke*, 157 (1967); "Introduction I in *Lex Mercatoria* and Arbitration XV", (Carbonneau ed. 1990).

[35]Mustill, "The New *Lex Mercatoria*: The First 25 Years", in *Liber Amicorum for the Right Honourable Lord Wilberforce*, (1987); "Contemporary Problems in International Commercial Arbitration: A Response", (1989) 17 *Int'l.Bus.L.* 161.

[36]Delaume, "State Contracts and Transnational Arbitration", 75 *Am.J.Int.Law* 784 (1981).

[37]Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, (2d ed. 1989) at p. 81.

[38]The French authorities opposing the application of the new *lex mercatoria* include Rogers, Kassis, Lagarde and Khan. For reservations against the practicability of the *lex mercatoria* concept, see Sornarajah, International Commercial Arbitration, at p. 116 et seq.; van den Berg, New York Convention, 1984, at 200; Samuel, (1991), at pp. 27,45; Spickhoff, Rabels 1992, at p. 124 (highlighting the considerable problems in finding the law); Delaume, *ICSID Rev.* 1988, at pp. 79, 105; and Toope, *Mixed International Arbitration*, (1990) at p. 95.

to understand the rules of the new *lex mercatoria.*[39] Lack of a clear definition and detailed rules is the main deficiency criticised by this school of thought. They are convinced that without clear indications of the scope of the new *lex mercatoria*, the results of arbitration will be unpredictable.

They also believe that the lack of precise rules may lead the arbitrators to render an award of what they deem fair and reasonable even though the parties never authorised them to decide the case *ex aequo et bono.* As a result, through the application of the new *lex mercatoria*, the parties will not have any control over the choice of law proceedings since the *lex mercatoria* gives the arbitrator a practically unbridled discretion. Eventually, they argue, the application of the new *lex mercatoria* will distort the purpose of the choice of laws rules in international business contracts.[40]

Secondly, they do not regard the new *lex mercatoria* as a legitimate source of law because it does not meet the definition of "law". In their opinion, law is a system of written rules that a state develops over time and enacted by the legislature in order to deal with business agreements, social relationships, crime and other aspects of people's daily life. Such a description does not correspond with the new *lex mercatoria,* which draws its source from unwritten practices and trade usages common to business transactions. Consequently, any awards made on such a basis may not provide a solid basis for a national jurisdiction to recognise or enforce them.[41]

---

[39] Gertz, "The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage", 12 *Northwest.J.Int'l.L. & Bus.* 163 (1991), at p. 176.

[40] *Ibid.* at p. 177.

[41] Delaume, "Comparative Analysis as a Basis of Law in State Contracts: The Myth of the *Lex Mercatoria*", 63 *Tul.L.Rev.* 575 (1989).

The final point of attack by this group of jurists is the lack of a source of precedent within the new *lex mercatoria*. Without any precedents, the level of predictability of the result can be seriously affected. As Messrs Randall and Norris commented:

> "even if arbitral decisions were made public, their value is slight because lengthy explications of the ruling are not required and the decisions analyse few written rules. So the *lex mercatoria* again is not positivistic, but rather more akin to customary international law. More precise precedent would be far more helpful in this context, particularly where unique or complex deals are involved."[42]

Lord Mustill also strongly opposed the notion of the new *lex mercatoria*. He dismissed the argument that the new *lex mercatoria* can fill a gap left by the municipal laws on the ground that the new *lex mercatoria* is nowhere to be found in an explicit form. It must be culled by the individual arbitrator from whatever sources he may find to be fruitful: such as, the writings of scholars and the common features of various systems of municipal law. Moreover, since no codified rules are provided, the parties will be left in an uncertain position until the arbitrators render the awards.[43] Lord Mustill has further indicated that, it is not a simple task to codify these common trade usages:[44]

> "The proponents of the *lex mercatoria* claim it to be the law of the international business community, which must mean the law unanimously adopted by all countries engaged upon two centuries ago. But the international business community is now immeasurably enlarged. What principles of trade law, apart from those which are so general as to be useless, are common to the legal systems of the members of such a community? How could the arbitrators amass the necessary materials on the laws of, say, Brazil, China, the Soviet Union, Australia, Nigeria, and Iraq?"[45]

After a serious debate about the new *lex mercatoria* among the international practitioners, the opinion in favour of the application of the new *lex mercatoria* has

---

[42] Randall and Norris, "A New Paradigm for International Business Transactions", 71 *Wash.U.L.Q.* 599 (1993), at p. 611.

[43] Mustill, "Transnational Arbitration in English Law", (1984) 33 *Curr.L.Pr.* 133, at p. 150.

[44] Mustill, "The New *Lex Mercatoria*", (1988) 4 *International Arbitration*, 86.

[45] *Ibid.* at pp. 89, 92-93.

prevailed. The proponents of the new *lex mercatoria* include Lando,[46] Goldman,[47], Lew,[48] Schmitthoff,[49] Lowenfeld[50], Carbonneau,[51] Berman,[52] and Dasser.[53] They maintain that the new *lex mercatoria* is a kind of independent legal order, being separated from any national laws, and suitable to settle the disputes arising from the international merchant community.

The proponents also argue that, from the parties' viewpoint, the new *lex mercatoria* provides business people with an alternative choice to free themselves from the strict application of national laws and subject themselves to a more flexible legal system. They also argue that business people frequently wish their disputes to be given a solution other than that which would be given by national laws.[54] On the other hand, from the arbitrator's point of view, the flexibility of the new *lex mercatoria* will enable arbitrators to meet the legitimate expectations of parties and apply the most up to date rules and reasoning to resolve any kind of dispute arising from international commercial transactions.

---

[46]Lando, "The *Lex Mercatoria* in International Commercial Arbitration", (1985) 34 *I.C.L.Q.* 747; *Conflict of Law Rules for Arbitrators in Festschrift für Konard Zweigert* (1981). The French authorities include Fouchard, Francescakis, Oppetit, and Robert.

[47]Goldman, "The Applicable Law: General Principles of Law - The *Lex Mercatoria*", in Lew (ed.) *Contemporary Problems in International Arbitration,* (1986) 113 (hereinafter Lew, *Contemporary Problems*); "Introduction I in *Lex Mercatoria* and Arbitration XV", (Carbonneau ed. 1990).

[48]Lew, *Applicable Law in International Commercial Arbitration*, (1978) at pp. 436-437 para. 343 (hereinafter Lew, Applicable Law), and Lew, *Contemporary Problems*, (1986).

[49]Schmitthoff, "The Law of International Trade, Its Growth, Formulation Operation", in *Sources of the Law of International Trade*, at p. 3 (1964); *Commercial Law in a Changing Economic Climate,* (2nd ed. 1981); *Export Trade*, at pp. 655-656 (5th ed. 1990).

[50]Lowenfeld, "*Lex Mercatoria:* An Arbitrator's View", (1990) 6(2) *Arbitration Int.* 133; and *International Litigation and Arbitration*, (1993).

[51]Carbonneau (ed.), "The Remaking of Arbitration : Design and Destiny", in *Lex Mercatoria and Arbitration*, (1990) at p. 1; and *Alternative Dispute Resolution*, (1989) pp. 59-104.

[52]Berman, *Law and Revolution, the Formation of the Western Legal Tradition*, 339-340 (1983).

[53]"The 'New' Law Merchant and the 'Old' Source, Content and Legitimacy", in *Lex Mercatoria and Arbitration*, at p. 21 (Carbonneau ed. 1990).

[54]David, *Arbitration in International Trade*, (1985), at p. 16.

The supporters of the new *lex mercatoria* also believe that international business people with common interests should be able to organise a community with its own legal system that does not derive its authority from any municipal laws. Within this community, arbitrators play a similar role to the judges from national courts. Consequently, with the freedom to find better rules of law which the national judges may not be able to apply, arbitrators should be regarded as the inventors when they apply the new *lex mercatoria* as the substantive law of the contract.[55]

Furthermore, they maintain that the popularity of the new *lex mercatoria* within the international commercial community is caused by the fact that the new *lex mercatoria* can provide equity which may be ignored by applying national laws. An example of late delivery of goods is used by Professor Lando to illustrate this point. Professor Lando uses Danish law as an example. In the case of the late delivery of goods, buyers are required to send an immediate notice to the seller under the Danish law. Nonetheless, some doubts would arise as to whether it is more reasonable for the Danish courts to reduce the demands put on buyers who are foreign subjects and who failed to send an immediate notice to the seller when goods were delivered late as required under the Danish law. He argues:

> "By choosing the *lex mercatoria* the parties oust the technicalities of national legal systems and they avoid rules which are unfit for international contracts. Thus they escape peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws which are unknown in other countries such as the common law rules on consideration and *privity* of contract. Furthermore, those involved in the proceedings - parties, counsel and arbitrators - plead and argue on an equal footing; nobody has the handicap of seeing it governed by a foreign law. "[56]

Moreover,

> "...the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by State authorities but that it is recognised as an

---

[55] Lando, "The *Lex Mercatoria* in International Commercial Arbitration", (1985) 34 *I.C.L.Q.* 747, at p. 754.

[56] *Ibid.* at p. 748.

> autonomous norm system by the business community and by State authorities."[57]

The same opinion is expressed by Professor Thomas, who agrees that, in terms of the parties' intention, an award made under the new *lex mercatoria* may be different from a judgment made by the court which can only apply national laws to decide the disputes. His point is expressed in the following terms:

> "When the issue is looked at reasonably and practically to release commercial arbitrators from the obligations to apply the law is to enable arbitrators to act in a manner the parties to the agreement wish them to act, and in a manner in which commercial judges frequently wish they themselves could act. Thereunder it would be open to arbitrators to construe commercial agreements according to the prevailing commercial understanding of their effect; give effect to invalid agreements when it is clear that the parties intended to be in honour bound by such an agreement; take a liberal view of the effect of illegality on contracts; adopt an approach to the categorisation of contractual terms which would foster certainty; apply a commercial understanding of the doctrine of frustration; ignore technical defences which are unworthy and shamefaced; and so on. All these decisions would entail the arbitral forum arriving at a decision different from that of a court of law faced with similar facts. This difference does not however, inevitably lead to a qualitative difference. Justice according to law is but one manifestation of justice; justice according to an arbitral scheme established by parties in dispute is another. the error of the prevailing policy, as Lord Devlin has so perceptively observed, is its adherence to the belief that beyond justice according to law there is nothing other than injustice."[58]

While the debates over the new *lex mercatoria* continue, in practice, the new *lex mercatoria* has frequently been applied to decide the disputes in international commercial contracts. The issue may be what Professor Delaume describes as no longer being whether transnational contract fitted well within the framework of the national private laws but which law can provide answers to the parties' disputes. He states:

> "Today, a number of contractual relationships involve both subjects of private and public international law, and, with increasing frequency, a plurality of parties whose combined efforts are required for the carrying out of a single

---

[57] *Ibid.* at p. 752.

[58] Thomas, "Commercial Arbitration - Justice According to Law", (1983) 2 *Civil Just.Q.* 166, at p. 182.

> venture. Neither traditional domestic law rules nor, to the extent that they can be identified with sufficient precision, international law norms necessarily provide adequate answers to problems that they were not designed to meet in the first place."[59]

5.4 The adoption of the new *lex mercatoria* in international conventions, arbitration rules and international commercial arbitration cases

5.4.1 International conventions and international arbitration rules

Although no conclusive agreement has been reached as to the definition and applicability of the new *lex mercatoria*, this concept is adopted by some international conventions and the international arbitration rules. In relation to international conventions, Article VII (1) of the European Convention on International Commercial Arbitration provides:

> "the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as the applicable law, the arbitrator shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usage."

In accordance with this article, first, parties are allowed to choose the new *lex mercatoria* to govern the substantive disputes of the contract. Secondly, in the case where the choice of the proper law is referred to a national law, arbitrators are still required to pay attention to the relevant trade usage.

Nevertheless, the question is whether the 'trade usage' mentioned in Article VII (1) means the new *lex mercatoria* discussed in this work. Primarily, trade usage is one of the sources of the new *lex mercatoria*. Nonetheless, from the previous sections of this chapter, it should be noted that the jurists do not strictly distinguish trade usage from the new *lex mercatoria*. At times, they are interchangeable. This situation is

---

[59] Delaume, "State Contracts and Transnational Arbitration", 75 *Am.J.Int.Law* 784 (1981). Also see Berger, *International Economic Arbitration*, Vol. 9 (1993) at p. 532.

evident, for instance, when Lord Mustill used trade usages when he pointed out the difficulties in codifying the new *lex mercatoria.*[60] In the present writer's opinions, trade usage as used in Article VII (1) is, in fact, a reference to the new *lex mercatoria*discussed in this thesis.

Apart from international conventions, arbitrators are offered a greater power than those of judges to apply the law he regards appropriate.[61] Instead of explicitly mentioning the new *lex mercatoria*, the words "take into account the usage of the trade" or "take account of ... the relevant trade usages" has been mentioned in various arbitration rules, such as Article 28(4) of the UNCITRAL Model Law, Article 33(3) of the UNCITRAL Arbitration Rules, Article 33(1) of the Iran-US Claims Tribunal, and Article 13(5) of the ICC Rules. While international conventions and international arbitration rules have adopted the notion of the new *lex mercatoria*, the most important legal materials illustrating the acceptance of the new *lex mercatoria* in practice are arbitral awards. The following study will highlight the practice of applying the new *lex mercatoria* in arbitration.

5.4.2 International arbitral awards[62]

The new *lexmercatoria* has been applied in a number of arbitral awards, both *ad hoc* and institutional arbitration. In a case of an *ad hoc* arbitration where an English company and a Belgian company were involved, the dispute arose from a concession agreement which included an exclusive distributorship contract. The parties did not

---

[60]Mustill, "The New *LexMercatoria*", (1988) 4 *International Arbitration*, 86.

[61]Article 28 (2) of the UNCITRAL Model Law, Article 33 (1) of the UNCITRAL Arbitration Rules, and Article 13 (3) of the ICC Rules.

[62]Due to a difficulty in obtaining arbitral awards, this part of the study will primarily be based on the ICC awards and those published in the *Yearbook of Commercial Arbitration.*

specify the substantive law; however, an arbitration clause contained in the concession contract empowered the arbitrators to decide the case as *amiable compositeurs*.[63]

The arbitrators firstly allocated the dispute under a national law framework. In accordance with the Belgian choice of law rules, English law would be the proper law of the contract by applying the objective test. However, they found that the English law did not agree with the notion of amiable composition under its legal system. Under these circumstances, the arbitrators tried to confirm the real intention of the parties on the issue of the choice of law. Then, they decided that the parties indeed sought to give amiable composition an extremely comprehensive meaning and sought to help possible litigations escape from any national law.

After ascertaining the parties' intention, the arbitrators exercised the power of amiable composition to choose the new *lex mercatoria* as the proper law of the contract on the ground that arbitrators are not necessarily obliged to determine a national law applicable to the substance. As they held,

> "Having established that the character of the contract, and the place where it has its effect, necessarily exclude an obligatory application of either Belgian or English law, it is for the above-mentioned reasons that the arbitrators will abide by the '*lex mercatoria*' in the exercise of their power as *amiable compositeurs*."[64]

The new *lex mercatoria* is not an unfamiliar phenomenon in ICC arbitration. In fact, it has been applied in a large number of cases. For instance, the new *lex mercatoria* was applied in a case where the dispute arose from a construction contract involving a project in USSR between a French enterprise and a Yugoslav subcontractor.[65] The dispute was referred to the ICC in accordance with the arbitration clause in which no

---

[63] This award was enforced in Belgium by a decision of the Court of First instance of Brussels, December 12, 1978., and confirmed by the Court of Appeal of Brussels on October 14, 1980.

[64] *Mechema Ltd. v. S.A. Mines, Minerais et Metaux, Ad hoc* Arbitration, Award of November 3, 1977, Reprinted in (1982) VII *Y.B.C.A.* 77, at p. 79.

[65] ICC case no. 3540, October 3, 1980, reprinted in *Collection of ICC Awards 1974-1985*, 105-115.

proper law was expressed. The arbitration was held in Geneva, the procedure was subject to the law of Canton of Geneva, that is, the Swiss Concordat on Arbitration, subsidarily to the law of the Canton of Geneva for all matters not regulated in the Arbitration Rules of the ICC. In accordance with Article 13(4) of the ICC Arbitration Rules, the arbitrators were to decide the case as *amiable compositeurs*.

After agreeing to decide as *amiable compositeurs*, the arbitrators tried to decide the proper law of the contract according to the choice of laws rules. The arbitrators regarded Yugoslav law - the law of the habitual residence of the builder - as the proper law in accordance with the choice of laws of the *lex fori*, that is, Swiss private international law. However, this choice was dismissed because neither party had invoked the application of the Yugoslav law. Later, Russian law, the law of the place of performance, was considered as the proper law in accordance with French private international law. However, this possibility was also dismissed on the same ground.

The arbitrators decided to avoid the choice of laws rules on the ground that "in this field the most recent and authoritative doctrine as well as the jurisprudence of arbitrators, especially that of the ICC, acknowledge that in determining the substantive law arbitrators may avoid the rules of conflict of the forum if they have the power of *amiable compositeurs*."[66] Finally, the arbitrators decided to apply the "direct approach" and base their decision uniquely on the contract and the general and common legal principles. According to these principles, the new *lex mercatoria* was chosen as the proper law of the contract.

The second award made on the basis of the new *lex mercatoria* was *Pabalk Ticaret Limited Sirketi v. Norsolor*.[67] In this case, a dispute arose from an agency contract

---

[66]*Ibid.* at p. 109.

[67]ICC case no. 3131, October 26, 1979, reprinted in *Collection of ICC Awards 1974-1985*, pp. 122-124.

between Pabalk and Ugilor, which later became Norsolor. In accordance with the agreement, Pabalk was to receive commissions for the delivery of a certain product to a Turkish company Aska. However, later, Ugilor terminated the agreement with Pabalk. Pabalk, submitted the dispute to ICC and claimed unpaid commissions and damages.

However, no proper law was mentioned in the agreement. In the absence of any reference to a given law and clear indication to reveal the common intention of the parties, the arbitrators decided the substantive disputes should be governed by the new *lex mercatoria*. As they explained:

> "Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*."[68]

Furthermore, based on the principle of good faith which inspires the new *lex mercatoria*, the tribunal made an award in Pabalk's favour and confirmed that the breach of the agency had caused damage to Pabalk; therefore equity would hence require to be remedied.[69]

In another case, the dispute arose from a construction contract between a Mexican construction company and a Belgian company.[70] According to the contract, the arbitrators were offered the powers to act as *amiable compositeurs*; however, no choice of proper law was made. One of the issues examined by the arbitrators was which law should be the law governing the substantive law. Because no choice of law was made in the arbitration agreement and no intention of applying any particular national law was expressed by the parties, the arbitrators decided to apply the new *lex*

---

[68] *Ibid.* at p. 123-124.

[69] *Ibid.* at p. 124.

[70] Final award of case no. 3267, 28 March 1984 reprinted in *Collection of the ICC Arbitral Awards 1986-1990*, 43-52.

mercatoria to resolve the disputes between the parties. The arbitrators tried to justify their choice by stating:

> "In the first award, the arbitral tribunal decided to determine the issue under generally accepted legal principles governing international commercial relations, without specific reference to a particular system of law, which was qualified by a learned commentator[71] as a reference to *lex mercatoria*. In the second phase of this arbitration neither of the parties did require the application of any particular system of law, nor did they rely on any specific provision of any municipal system. The arbitral tribunal sees no reason therefore, to depart from the view expressed in its first award on this aspect of the cases. Indeed, as it will appear later, all legal issues in this arbitration depend on the construction and system of the contractual documents."[72]

In this case, the other issue connected with the application of the general principles of international commercial law or the new *lex mercatoria*was the question of the nature and extent of the powers of arbitrators acting as *amiable compositeurs*. In other words, in addition to the new *lex mercatoria*, whether the power to act as *amiable compositeurs* entitled the arbitrators to modify or disregard the provisions of the contract? The arbitrators were convinced that this question should be answered case by case. As they explained:

> "As a matter of principle, the arbitral tribunal does not reject the view that an *amiable compositeur* may go beyond certain solutions deriving from the normally applicable legal rules, be they those of a municipal legal system or those of *lex mercatoria*. The question however is how far he can go, especially when faced with specific provisions of a contract. A further question is whether the individual situation and circumstances justify his making use of such power. These two questions shall be dealt with when examining the specific claims in connection therewith."[73]

Another dispute arising from two construction contracts for two individual office buildings in two Saudi Arabian cities was submitted to the ICC.[74] The plaintiff was a Lebanese construction company while the defendant was a company in Saudi Arabia.

---

[71]Yves Derains, "Chronique des sentences arbitrales", (1980) *J.D.I.* 961, at p. 966-969.
[72]Final award of case no. 3267, 28 March 1984, reprinted in *Collection of the ICC Arbitral Awards 1986-1990*, 43-52, at p. 45.
[73]*Ibid.* at pp. 45-46.
[74]ICC case no. 4840 (1986), reprinted in *Collection of the ICC Arbitral Awards 1986-1990*, pp. 465-476.

An arbitration clause was found in the arbitration clause which read; "All disputes or differences in respect of which the decision (if any) of the Consultant has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." However, no choice of law was made. As far as the choice of law was concerned, on the one hand, the defendant contended that Saudi law should be the proper law, and on the other hand, the plaintiff objected to the defendants' request to apply Saudi law and claimed that no specific law was referred to since the parties adopted an international form for their contracts.

Being convinced that the contracts had an international character, the arbitrators rejected the defendant's claim for the application of the Saudi law. The arbitrators stated that, according to the F.I.D.I.C. form used by the parties, it was clear that the parties did not wish to subject their contract to the Saudi law.[75] Furthermore, as the arbitrators said:

> "due to the fact that the contracts under dispute are of an international nature, the Arbitral Tribunal believes that it should respond to the clear indication given by the parties at the date of signature of contracts not to apply a national system to the said contracts."
>
> Therefore, in the light of the foregoing, the Tribunal rules that it will give precedence in this dispute to the rules the parties have established for their relationship i.e. the terms of their contracts supplemented by the relevant trade usage applicable to the matter and, for issues directly related to the object of the contractual relationship that may arise in the course of this arbitration and which are not provided for in the contract, the Tribunal would supplement by the Saudi law in the first place."[76]

The new *lex mercatoria* has also been applied in conjunction with a municipal law by the ICC arbitrators. A dispute between Italian and Libyan parties was referred to the ICC.[77] The dispute arose out of a contract for building and civil engineering works in

---

[75]*Ibid.* at p. 471.
[76]*Ibid.* at p. 472.
[77]ICC case no. 4761 (1987) reprinted in *Collection of the ICC Arbitral Awards 1986-1990*, 519-525.

Libya. In the partial award made with the parties' consent, the arbitral tribunal held that the Libyan law was the primarily applicable law. Recognising that, in principle, the Libyan law was the proper law, the tribunal also added that the Libyan law would be supplemented by the new *lex mercatoria* and the general principles of law where Libyan law was not proved or was incomplete.[78]

Furthermore, another dispute in connection with the content and characteristics of a letter of credit opened by the claimant was referred to ICC arbitration. The defendant suggested that the Turkish law was the proper law since Turkey was the place of performance. The claimant did not object to it, but pointed out that the tribunal should not restrict its choice to the legal provisions of a single country and should also take into account international usages and practice.

Considering the arguments presented by both parties, the arbitral tribunal decided to take both Turkish law and the provisions of the contract and of the relevant trade usages into consideration. It said:

> "In accordance with the classical doctrine on conflicts of law, Art 13(3) of the ICC arbitration Rules should be determined by the law in force at the place of arbitration (*lex fori*). However, this doctrine has been widely criticised, mainly in consideration of the fact that the arbitrator, differently out of the national judges, has no *lex fori*. Therefore, the arbitral tribunal considers it more appropriate to apply the general principles of international private law as stated in international conventions, particular those in the field of the sale of movable goods."

Moreover,

> "The Contract has been concluded and signed in Turkey and the seller had in Turkey its place of business at the time the Contract was signed. Therefore, the law applicable to the present dispute is the Turkish law. However, in conformity with Art. 13(5) of the ICC Rules of Arbitration, the arbitral tribunal shall take account also of the provisions of the Contract and of the relevant trade usages."[79]

---

[78] *Ibid.* at p. 521.

[79] ICC case no. 6527 (1991), reprinted in (1993) XVIII *Y.B.C.A.* 44 at pp. 45-46.

Compared with other arbitration institutions, ICC is regarded as the institution which most frequently applies the new *lex mercatoria* to international commercial disputes. As Article 13(5) of the ICC Rules provides that "in all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages," in some ICC arbitrations international trade usage is treated as a complementary source of authority which must be considered together with national law if the parties specify the proper law or the arbitrators decide it on the parties' behalf. In other words, under the ICC Rules, the arbitrators are required to pay consideration to international commercial law if the contract so requires.

Although trade usage is often employed as a supplement to a specific national substantive law to help with the interpretation of a contract, it could be a short-cut for the arbitrators to decide the substantive disputes of the case. Sometimes, as being seen in the *Norsolor v. Pabalk Ticaret* case,[80] where parties have not made an express choice of law, arbitrators can exercise the freedom offered by Article 13(5) and apply international commercial law principles, or the new *lex mercatoria*, as the governing law of the arbitration, without reference to any governing national law.

However, not every ICC arbitrator feels completely comfortable with the application of the new *lex mercatoria.* For instance, in a 1986 ICC case, the tribunal had been given broad discretion concerning the issue of choice of law, even to the extent that the arbitrators were allowed to act as *amiable compositeurs.* The three members of the tribunal, implicitly rejecting any resort to a delocalised law merchant, chose to apply national choice of law rules to determine the substantive law from national law regimes. This case is evidence that the concept of the new *lex mercatoria* is not shared by all arbitrators in practice.

---

[80](1980) V *Y.B.C.A.* 484. Report of the Supreme Court of Vienna, Nov. 18, 1982, reprinted in (1984) IX *Y.B.C.A.* 159.

Also, in another case concerning a dispute between a Syrian enterprise and a Ghanaian enterprise, the arbitrator refused to apply the *lex mercatoria* as the substantive law. In relation to the issue of the proper law, he stated[81]:

> "It is argued in literature that international arbitrators should, to the extent possible, apply the *lex mercatoria*. Leaving aside that its contents are not easy to determine, neither party has argued that a *lex mercatoria* should be applied. Rather, each party strenuously argued on the basis of a national law, i.e., Syrian and Ghanaian/English law respectively. Accordingly, the Arbitrator shall follow the implied desire of the parties to apply national law ... Ghanaian law would in principle be applicable."[82]

[81] Malmberg, Loek, J. was the arbitrator.

[82] ICC case no. 4237 (1984), reprinted in *Collection of ICC Arbitral Awards 1974-1985*, 167, at pp. 170-171.

Chapter Six

The application of amiable composition as the proper law of the contract in international commercial arbitration

Historically, amiable composition[1] was a concept which developed widely in France and other civil law countries.[2] The notion of amiable composition was first developed in the Code Napoléon and the French Code of Civil Procedure of 1806,[3] with the intention of restoring harmony between the parties and to work out a new kind of legal relationship between them.[4] Today, the notion and function of amiable composition remains the same. The purpose of this chapter is to show that the notion of amiable composition has been widely used in international arbitration rules and arbitral awards; nevertheless this practice has been rejected in some countries which require arbitrators to apply strict rules of law.

The term "principles of law and equity" can also be found in international law. According to Lammasch, a decision based on the "principles of law and equity" is one decided on the "basis of respect for law" in the sense of the Convention for the Pacific Settlement of International Disputes, signed at the Hague on October, 18, 1907.[5] This formula allows a judge to "correct positive law in basing his decision on considerations of equity."[6] Lammasch also agrees with the jurists who contend that a judge can and should fill gaps left by the positive laws, by means of equity in

[1]Sometimes, it is written as amicable, for example, Redfern, & Hunter, *International Commercial Arbitration*, (2nd ed. 1991).
[2]Born, *International Commercial Arbitration in the United States*, (1994), at p. 135.
[3]Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, (1990), at p. 310, footnote. 1.
[4]David, *Arbitration in International Trade*, (1985), at pp. 334-35.
[5]Habicht, *The Power of the International Judge to Give A Decision "Ex Aequo Et Bono"*, (1935), at p. 62.
[6]*Ibid.*

accordance with the spirit of the law.[7] Such power to decide disputes on the basis of equity and fairness has been explicitly provided in Article 38, para. 2, of the Statutes of the International Court of Justice.[8] In accordance with this provision, arbitrators can be empowered to decide a case *ex aequo et bono*, if the parties agree.

In international commercial arbitration, from the parties' point of view, the application of rules of law to determine the dispute cannot completely satisfy their particular needs. Under these circumstances, international arbitrators are frequently empowered to act as *amiable compositeurs* to determine the dispute on the basis of equity. Such power, which enables arbitrators to deviate from the application of law and decide the case on the basis of what is fair and reasonable according to their personal sense of equity, is commonly conferred by the so-called "equity clause".[9]

Under the power given in an equity clause, arbitrators can deviate from not only the application of national laws but also strict legal interpretation. Accordingly, the notion of amiable composition allows arbitrators to "depart from the strict application of rules of law,"[10] apply "equity and good conscience"[11] and "decide [the dispute] according to justice and fairness,"[12] when it is necessary. In other words, trying to reflect the reality of commercial activities, the arbitrators are empowered to disregard the strict legal rules and arrive at a solution on the basis of equity. In some cases, notwithstanding that a national law has been chosen to govern the substantive disputes, the parties can still empower the arbitrators to act as *amiable compositeurs*.[13]

---

[7] *Ibid.*

[8] For the text, see Chapter Five.

[9] Although amiable composition is included in the types of equity clause listed by Sir Michael Kerr, he states that the English meaning of amiable composition is far from clear. See Kerr, M., "Equity Arbitration in England," 2(4) *The American Review of International Arbitration*, 377 (1993).

[10] Jarvin, "The Sources and Limits of the Arbitrator's Powers", in Lew (ed.) *Contemporary Problems in International Arbitration*, (1986) 50, at p. 70 (hereinafter Lew, *Contemporary Problems*).

[11] *Ibid.*

[12] Peter, *Arbitration and Renegotiation of International Investment Agreements*, (1986), at p. 172.

[13] Jarvin, "The Sources and Limits of the Arbitrator's Powers", in Lew, *Contemporary Problems*, at p. 71.

Being regarded as a substitution of a national law regime, amiable composition has been called a "negative" choice of law clause.[14] Among the legal materials on this subject, different expressions have been used in the arbitration agreement to represent such a power; for instance, arbitrators have been empowered to decide the case *ex aequo et bono*, or, to "act as *amiable compositeurs*". Nonetheless, for uniformity, the term "amiable composition" will be used throughout this work.

6.1 The difference between the new *lex mercatoria* and amiable composition

Although the content of the new *lex mercatoria* and amiable composition remains uncertain, the distinction between the two can easily be drawn. Amiable composition refers to the structure of an arbitration, whereas the new *lex mercatoria* refers a body of rules that can be applied in an arbitration. Fundamentally, amiable composition does not require arbitrators to determine the case according to law, but rather according to their sense of equity, whereas the new *lex mercatoria* is a set of principles of equity developed throughout the centuries, not rooted in any particular national legal system.[15] In addition, it is not necessary to empower arbitrators to act as *amiable compositeurs* in order to apply the rules of the new *lex mercatoria*,[16] though an amiable composition clause is, from time to time, regarded as an implied licence to apply the new *lex mercatoria*.[17] As an arbitral tribunal held: "As a matter of principle, the arbitral tribunal does not reject the view that an *amiable compositeur* may

---

[14] *Ibid.*
[15] Carbonneau, (ed.) *Resolving Transnational Disputes Through International Arbitration*, (1984), p. 134.
[16] De Ly, *International Business Law and the Lex Mercatoria*, (1992), at p. 222.
[17] Goldman, "The Applicable Law: General Principles of Law - the *Lex Mercatoria*", in Lew, *Contemporary Problems*, at p. 113.

go beyond certain solutions deriving from the normally applicable legal rules, be they those of a municipal legal system or those of the new *lex mercatoria.*"[18]

6.2 The difference between amiable composition and deciding the case *ex aequo et bono*

The concepts "*ex aequo et bono*", "*equity*" and "*amiable compositeur*" are similar and can easily be confused. As a number of commentators have said: "most authorities appear not to distinguish between the concepts of *ex aequo et bono* and *amiable compositeur*, although different legal systems may attach varying meanings to each."[19] The term "*ex aequo et bono*" refers to certain moral and legal standards or to a higher sphere of justice. Therefore, the power to decide the case *ex aequo et bono* enables arbitrators to have more freedom to decide the dispute based on their own notions of justice. With respect to equity, though arbitrators are bound to apply law to decide disputes, by applying the concept of equity they may ignore any rules which appear to operate harshly. An *amiable compositeur* is subject to the rules of "natural justice and must observe the fundamental rules governing judicial procedure and material law."[20] Furthermore, as long as it does not contradict public policy, an *amiable compositeur* can alter the terms of the contract if it appears to be appropriate.[21]

In sum, the common idea among these three terms is that arbitrators are not obliged to decide the disputes in accordance with strict rules of law. Instead, arbitrators are required to decide the dispute in light of general notions of fairness, equity, and justice. However, the present writer does not intend to over-emphasise the difference in this study since the terms have been used interchangeably in legal literature;

[18]ICC case no. 3267, March 28, 1984, reprinted in *The Collection of ICC Arbitral Awards 1986-1990*, 43-52, at p. 45.
[19]Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration*, (2nd ed. 1990), at p. 310; Brown, & Marriott, *ADR Principles and Practice*, (1993) at p. 63.
[20]Mustill & Boyd, *Commercial Arbitration*, (2nd. ed. 1989), at p. 77.
[21]Sanders, *International Commercial Arbitration*, (1962), at p. 19.

furthermore, it is not the purpose of this study to provide a clear distinction between them.

Although the concept of amiable composition is not accepted in every jurisdiction, the arbitral awards made on such a basis can be seen in a number of cases. Lord Devlin observed that an equity clause has been used as one of the various devices designed to get justice enmeshed in the legal systems. He spoke of this concept of justice in the following terms:

> "It is a common enough feeling to desire the end and to dislike the means. The public desires order and dislikes law, though without law there would be no order. The judicial qualities which the public singles out for praise are common sense and humanity; devotion to the law is less admired than a willingness to strain it. It is not surprising therefore that from the earlier times English legal system has accommodated various devices designed to enmesh the legal system with the justice of the case."[22]

6.3 The opinions for and against of the application of amiable composition

There is a fear that the arbitrator's power may be open to abuse by means of amiable composition. In common with the new *lex mercatoria*, the concept of amiable composition is also not shared by all jurisdictions, especially those which insist on the application of strict rules of law to determine the substantive issues. If the awards fail to comply this requirement, they may be challenged on the grounds of mandatory rules and public policy.

Objections to amiable composition are especially notable among English lawyers. Due to unfamiliarity with the concept of amiable composition, English lawyers tend to treat it as an unknown object and dismiss any possible use in arbitration. In their opinion, arbitrators, empowered as *amiable compositeurs*, are analogous only to conciliators or

[22]Lord Devlin, *The Judge*, (1979), at p. 92.

mediators who guide the parties towards a compromise settlement of their dispute. Such function is, they argue, contradictory to that of arbitrators whose decision is to have the force of law. As Sir Michael Kerr argues:

> "If the function of an *amiable compositeur* is merely to mediate and conciliate, then he is not an arbitrator. If his function includes the powers to impose a compromise settlement upon the parties as a binding decision which disregards the legal position, then he would equally not be acting as an arbitrator according to law, and his 'award' would risk being set aside."[23]

He concludes that a reference to amiable composition is a sequential actions, "whereby mediation /conciliation are tried first and are followed by an arbitration if they fail. In effect, therefore, the reference to arbitration would then not operate as an equity clause at all."[24]

Although there is a dispute over the concept of amiable composition, the opinion in favour of its application prevails in practice. Jurists who are in favour of the notion of amiable composition are divided into two camps. One group of jurists contend that an arbitrator's power to decide the dispute as an *amiable compositeur* should be accessory to law, or, to be precise, such power should supplement the deficiency in the particular rule of law. In accordance with their opinion, while exercising the power of amiable composition, arbitrators should not only consider the international law but also the municipal laws which are relevant to the case. Furthermore, the municipal laws should only be disregarded if they are contrary to the general principles of law.

Nevertheless, the other faction within the jurists uphold a more liberal attitude towards the notion of amiable composition. This group of jurists argues that, in the case where the law is contrary to the principles of justice, arbitrators only have to consider the principles of international justice when they are empowered to decide the case *ex aequo et bono* or act as *amiable compositeurs*. One commentator has said: "in the

---

[23] Kerr, "Equity Arbitration in England," 2(4) *The American Review of International Arbitration*, 377 (1993), at pp. 383-384.
[24] *Ibid.* at p. 384.

most extreme sense, an arbitrator is under no obligation to observe the rules of law."[25] This group of jurists believes that the power to decide a matter *ex aequo et bono* allows an international arbitrator to base his decision exclusively on considerations of equity in the sense of general justice and to disregard the rights and obligations in force in so far as their application would lead to an inequitable solution.[26] Moreover, they maintain that "considerations of equity are applied in an *ex aequo et bono* decision not only to supplement the law, but also to overrule it, if the application of the law would cause an inequitable result."[27]

After extensive debate on this subject, the group which is in favour of the idea that both international law and municipal law may be ignored if they are in conflict with the general principles of justice and amiable composition has prevailed. This idea was applied in a decision made by an American-Norwegian Arbitral Tribunal in 1922. As the tribunal decided that: "The Tribunal cannot ignore the municipal law of the Parties, unless that law is contrary to ... the principles of justice."[28] According to this judgment, the formula "principles of law and equity" permits the arbitrators to disregard the relevant positive law if it is contrary to the general principles of justice.

Following this idea, it is clear that the power of amiable composition or deciding *ex aequo et bono* enables the arbitrators to have more freedom to detach their decision from municipal laws and decide the case according to their own notions of justice. Nevertheless, such a clause does not confer an unlimited freedom upon them. To a certain extent, such a clause may allow arbitrators to escape from the restraints of the national laws; however, they are still bound by the general principles of justice and by generally recognised standards of international relations. In other words, a clause of

---

[25]Mustill & Boyd, *Commercial Arbitration,* (2nd. ed. 1989), at p. 77.
[26]Habicht, *The Power of the International Judge to Give A Decision "Ex Aequo Et Bono"*, (1935), at p. 2.
[27]*Ibid.*
[28]A decision made by the American - Norwegian Tribunal 1922.

amiable composition does not give arbitrators a "blank cheque" or unfettered discretionary power. After all, a decision made by *amiable compositeurs* is still an arbitral decision pronounced with binding force, and it must, by definition, follow general principles and standards.

6.4 The adoption of the notion of amiable composition in international conventions, arbitration rules and domestic laws

The notion of amiable composition has been adopted by various international conventions, arbitration rules and some domestic laws. In the case of international conventions, the concept of amiable composition can be seen in Article VII (2) of the European Convention on International Commercial Arbitration, which states that "The arbitrators shall act as *amiables compositeurs* if the parties so decide and they may do so under the law applicable to the arbitration."[29] A similar passage is also found in Article 55(2) of ICSID Facility; Schedule C: Arbitration, Article 42(3) of the ICSID Convention, Article 30 of the Permanent Court of Arbitration Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is A State.

Although different opinions are held towards the application of amiable composition in international commercial arbitration, such power has also been adopted in various international arbitration rules. The concept of amiable composition has been adopted by the major international arbitration rules. For instance, the phrase "the arbitrators shall assume the powers of an *amiable compositeur* if the parties are agreed to give him such powers," has been incorporated in Article 13(4) of the ICC Arbitration

[29]The term *amiable compositeurs* is used in this Article.

Rules,[30] Article 29(3) of the American Arbitration Association International Rules, Article 33(2) the UNCITRAL Arbitration Rules[31] and Art. 33(2) of the Iran-US Claims Tribunal Rules.

Apart from international conventions and arbitration rules, in order to keep up with the trend in international commercial arbitration, some jurisdictions also incorporate the concept of amiable composition into their domestic legislation. For instance, Article 1497 of the French Code of Civil Procedure allows arbitrators to be empowered as *amiable compositeurs*, as it is provided: "The arbitrator shall decide as *amiable compositeur* if the parties' agreement conferred this authority upon him." An identical provision can also be seen in Article 1054(3) of the Netherlands Arbitration Act 1986. Although using the term "*ex aequo et bono*", Article 187(2) of the Swiss Private International Law Act 1987 upholds such an application by saying that "The parties may authorise the arbitral tribunal to decide *ex aequo et bono.*"

6.5 The application of amiable composition in international arbitral awards

Despite all the objections, amiable composition has frequently been applied to decide the dispute between the parties in a number of international arbitral awards. It is especially the case in ICC arbitration whose rules expressly permit such practice. For instance, in an ICC arbitration, a dispute concerning non-payment by one of the parties arose from a construction contract for a sugar plant. The arbitration was held in Zurich. The arbitral tribunal decided that the legal problems arising from this contract should be settled in accordance with the rules of Swiss law, which gave the

---

[30]The term *amiable compositeurs* is also used in this Article.

[31]The provision is as follows: "The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration."

tribunal the power of amiable composition. Acting as *amiable compositeurs*, the tribunal decided to rule on the case on the basis of equity according to the terms of Art. 19 para. 3 of the Rules of Conciliation and Arbitration. As to the issue of the proper law, the tribunal held that: "according to general principles, the arbitral tribunal is not authorised to take a decision contrary to an absolutely constraining law, particularly the rules concerning public order or morals."[32]

The power of amiable composition was, again, exercised in another case where the general principle governing commercial international law was applied to decide the substantive issues. In June 1976, a Saudi Arabian state entity entered into a construction contract with a Belgian company, which, later, sub-contracted part of this project to a Mexican company. However, due to the difficulties between the Belgian (Claimant) and Mexican (Defendant) parties, the Belgian company terminated the sub-contract in 1977. The issue whether it was a legal termination was instituted in ICC. In the arbitration agreement, no choice of law was mentioned. However, the claimant submitted that the legal issues arising from the sub-contract should be resolved with reference to general principles of commercial law, whereas the defendant did not specify which law should be applied.

Based on the hint to a specific legal system contained in (Claimant's) initial brief which refers to Belgian law in connection with the applicability of amiable composition, the arbitral tribunal decided that they were empowered to act as *amiable compositeurs*.[33] Furthermore, as regarding the issue of the proper law, based upon the power of *amiable compositeurs* the tribunal decided to apply the general principles of international commercial law. It stated:

---

[32]ICC case no. 1677 (1975), reprinted in *Collection of ICC Arbitral Awards 1974-1985*, at p. 20.
[33]ICC case no. 3267 (1979), reprinted in *Collection of ICC Arbitral Awards 1974-1985*, 76-87, at p. 78.

> "when the authority is granted to it [the tribunal] to act as *amiable compositeur*, as specified in the Contract and in the Term of Reference, the Arbitral Tribunal needs not to decide which specific law governs the contractual relationship between the parties.
>
> On the basis of foregoing, ... the Arbitral Tribunal will apply the widely accepted general principle governing commercial international law with no specific reference to a particular system of law."[34]

Moreover, on the issue of payments, the tribunal maintained that the agreement between the parties should be taken into account. As the tribunal held:

> "it is a generally accepted principle in international arbitration that the paramount duty of the arbitrator, even as '*amiable compositeur*', is to apply the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties, or violate a basic commonly accepted principle of public policy."[35]

Furthermore,

> "In addition to the power to decide on the dispute before him on the basis of generally accepted legal principles, without being deterred by the technicalities of a particular legal system, the arbitrator sitting as '*amiable compositeur*' is entitled to disregard legal or contractual rights of party when the insistence on such right amounts to an abuse thereof.[36]"

In another case, the disputes arose from a contract between an Italian (Claimant) and a Syrian company (Defendant).[37] The choice of law clause appeared in two individual Articles of the contract. According to Article 19.6, "Arbitration shall be held at Geneva (Switzerland) and shall judge according to the general principles of law and justice" whereas Article 25 of the contract provided that "This Agreement shall be subject to and constructed in accordance with the Law of Syria." The words "shall judge according to the general principles of law and justice" were hand-written, and replaced the printed words "*ex aequo et bono*".

---

[34] *Ibid.*
[35] *Ibid.* at p. 85.
[36] *Ibid.* at p. 86.
[37] ICC case no. 3380, November 29, 1980, reprinted in *Collection of ICC Arbitral Awards 1974-1985*, 96-100.

According to the Claimant, the dispute should be resolved by the arbitrators acting as *amiable compositeurs*. However, the Defendant argued that amiable composition should not be allowed and the general principles referred to in Article 19.6 were legal principles which should at least be common to the two systems involved, Syrian and Italian. Faced with this complicated situation, the tribunal decided to take into account both Articles 25 and 19.6. Finally, the arbitral tribunal decided that the power of deciding *ex aequo et bono* should be exercised together with the application of Syrian law. As the tribunal reasoned: "the contract is governed by and should be interpreted in accordance with Syrian law in its entirety without any restrictions, under reservations of the "general principles of law and justice", according to which the arbitrators have to decide under article 19.6."[38]

A dispute arising from a construction project in the USSR between a French enterprise and a Yugoslavian enterprise was also submitted to ICC. According to the arbitration agreement, arbitration was to take place in Geneva. The procedure was to be subject to the law of the Canton of Geneva, that is, the Swiss Concordant on Arbitration, subsidiary to the law of the Canton of Geneva for all matters not regulated in the Arbitration Rules of the ICC. In relation to the proper law of the contract, the arbitrators first of all exercised their power to act as *amiable compositeurs* according to the ICC Arbitration Rules. Secondly, they tried to ascertain the proper law by means of the choice of law rules. According to the principles of Swiss private international law (the *lex fori*), Yugoslavian law would be applicable. On the other hand, considering French private international law, Russian law, the *lex rei sitae* (the place of the activity of the contractor) would be the governing law. However, neither party invoked these two possibilities. Based on the power of amiable composition, and acknowledging the ICC rules, the arbitrators decided to avoid the conflict of laws rules

[38] *Ibid.* at p. 100.

of the forum and choose the new *lex mercatoria* as the proper law governing the substantive disputes in this case.[39]

Arbitrators will rarely decide the dispute on the basis of equity without the parties' authorisation. However, at times, arbitrators find grounds to act as *amiable compositeurs* from the relevant applicable law. For instance, in the case of *Wintershall AG et al. v. The Government of Qatar*,[40] arbitrators decided to act as *amiable compositeurs* on the basis of Article 49 of the Qatari Code, which provides that a contract "shall not bind a contracting party to the contents thereof, but it shall also extend to all its requirements in compliance with law, usage and equity depending on the nature of the obligation." The arbitrators regarded this provision as a basis for "an appropriate and equitable interpretation of the Government's obligations" in this case. Therefore, the arbitrators, regardless of the fact that adaptation of the contract without the parties' authorisation could constitute a ground for setting aside the award for being outside the tribunal's mandate, believed that the application of the relinquishment provision in relation to gas discoveries was equitable.

[39]ICC case no. 3540 (1980); reprinted in (1982) VII *Y.B.C.A.* 125-134. at p. 127.
[40]28 *I.L.M.* 795 (1989), at p. 823.

Summary of Part Two

While the general principles of law and the concept of amiable composition are supported by Article 38(1)(c) and 38(2) of the International Court of Justice Statutes, the new *lex mercatoria* developed during the Middle Ages has also been widely applied in international arbitral awards. For instance, in the case of state contracts, the general principles of law have been widely applied in order to reconcile the disagreement between the parties on the applicable laws. The new *lex mercatoria* is often chosen to govern the major international contracts. As well as applying the general principles of law and the new *lex mercatoria*, arbitrators are also asked to act as *amiable compositeurs*.

Nevertheless, all arbitral awards made on the basis of a-national principles fail to provide clear indications regarding the content of a-national principles. As discussed in this thesis, the arguments for and against the application of a-national principles to govern the contract in dispute has concentrated on whether clear guidelines have been provided for such a practice. Ironically, however, notwithstanding these arguments a-

national principles have often been applied in international commercial arbitration as shown in this part of the thesis.

It is frequently asserted that a-national principles, based on equity and the general principles developed among the commercial community, are more or less uniform throughout the world since the needs of commerce and the sense of justice and propriety of business people are supposed to be the same everywhere. It would certainly be beneficial if this were true; however, throughout the world a-national principles are perceived in different ways by different jurisdictions. Generally speaking, the notion of a-national principles has received wide support from the countries which have a long history of arbitration; whereas, the countries which have less developed arbitration frameworks are rather cautious about such a practice which encourages arbitrators to deviate from national law regimes.

The different attitudes towards the application of a-national principles in different jurisdictions lead to uncertainty about the validity of awards made on such a basis. The validity of a-national awards depend on whether the laws of the relevant countries permit such a practice. If such a practice is not permitted, a choice of a-national principles clause will be regarded as invalid; moreover, the awards made on such a basis will also be null and void.

For instance, whether or not the parties express a choice of a-national principles, in some cases arbitrators are in a difficult position if the law of the place of arbitration does not allow such a practice. If the arbitrators decide to apply the law specified by the parties, and such an application is against the mandatory rules or public policy of the place of arbitration, the losing party may successfully challenge the award. As a

result, the awards will not be recognised or enforced and will be set aside under the law of the place of the arbitration.[1]

However, sometimes the arbitrators will decide to ignore the parties' choice of law because it is against the *lex fori*. As a result of this, the awards may be challenged both in the courts of the place of arbitration and of the place where recognition or enforcement is sought because the arbitrators fail to respect the principle of party autonomy.[2] Furthermore, even though the law of the place of arbitration allows such a practice, the validity of the arbitral awards will be subject to the mandatory rules and public policy of the enforcing courts.

It is recognised that such a conflicting situation can cause a significant distraction of the purpose and design of international commercial arbitration; therefore, in the next part of the study, focus will be brought to these conflicting attitudes among different national jurisdictions.

[1] Article V (1) (e) of the New York Convention.
[2] Article V (1) (d) of the New York Convention.

PART THREE

The Attitudes of National Courts towards Arbitral Awards Made on the Basis of A-National Principles - A Study of Decisions of the French, English, United States, Hong Kong, Chinese and Taiwanese Courts

Introduction to Part Three

As outlined in Part One of this thesis, the traditional three-step choice of law rule in contract has lost its dominant place in international commercial arbitration. Instead, in the absence of the parties' choice, arbitrators tend to skip the implied choice of law test, and determine the proper law according to the closest and most real relationship test. However, it has been suggested that the national law regime cannot satisfy the particular needs of international commercial activities. As a result, a modern trend has developed which invokes the application of a-national principles as the proper law of international commercial contracts and has attracted the attention of academics and practitioners.

In accordance with this movement, a-national principles have frequently been chosen either by parties or arbitrators as the proper law to govern the disputes arising from international commercial contracts. For instance, as discussed in Chapter Four, the general principles of law have become a preferable choice of law for state contracts and the new *lex mercatoria* is also chosen as the substantive law of major international contracts. Moreover, with the demands for fairness outside the scope of strict legal rules, the notion of amiable composition has also become an alternative to govern the substantive issues of the contract. A-national principles have been applied as the proper law of the contract in a substantial number of international arbitral awards, as outlined in Part Two of this thesis.

In this part, the investigation will focus on whether the application of a-national principles in international commercial arbitration has been accepted by the national courts. The study will concentrate on the attitudes of the courts of a number of jurisdictions. In Europe, which has an extremely sophisticated arbitration system, France and England will be chosen as representative examples. On the North

American continent, transformed from having a historically hostile attitude to being arbitration friendly, the attitude of the United States courts will be investigated. Finally, looking at the Pacific Rim, which is regarded as the most fertile area for international commercial activities in the next century, the attitudes of the Hong Kong, Chinese and Taiwanese courts towards the issue of application of a-national principles.

This part of the study is composed of four Chapters. Chapter Seven will be an examination of the English courts' attitude towards awards based on a-national principles. Chapter Eight will discuss the liberal attitude of the French courts on the application of a-national principles in international arbitral awards. Chapter Nine will discuss the attitude of the United States courts on this subject and their changing views. Finally, in Chapter Ten, attention will be brought to the Pacific Rim countries, which have been less familiar and enthusiastic about arbitration. In that chapter, the attitudes of the Hong Kong, Chinese and Taiwanese courts towards awards made on the basis of a-national principles will be discussed individually.

Chapter Seven

Whether the English courts accept the application of a-national principles in international commercial arbitral awards

This chapter contains an investigation into whether the English courts accept the application of a-national principles in international arbitral awards. In England, international commercial arbitration has long been accepted as an alternative dispute settlement mechanism. However, compared with continental Europe, the English courts hold a rather conservative attitude towards the application of a-national principles. In English courts, the validity of awards made on the basis of the general principles of law and the new *lex mercatoria* was not accepted until two decades ago. Moreover, the validity of awards made on the basis of amiable composition or decided *ex aequo et bono* was not certain until the enactment of Arbitration Act 1996.

This chapter is composed of two sections. In order to show the difference in choice of law procedures between courts and arbitration, the first section provides a background study on the English judge's power to choose the proper law of the contract and the choice of law rules followed by them. Based on a case study, the second section of this chapter will examine whether the English courts accept awards made on the basis of a-national principles: including the application of the general principles of law, the new *lex mercatoria* and the notion of amiable composition.

7.1 The English judge's power in choosing the proper law of the contract

Before 1990, in order to determine the validity, interpretation, effect and discharge of a contract, English judges had to decide the proper law of the contract in accordance with the common law rules. The judges were required to apply the English choice of law rules to decide the proper law of the contract. The issue of the choice of law did not attract juristic attention until the eighteenth century. As disclosed by Cheshire and North:

> "It is at first sight surprising to learn that English lawyers did not find it necessary to deal with choice of law problems until a couple of centuries ago. Yet such is the case. There was not even an awareness of the problem in this country until the eighteenth century; it was not mentioned by Blackstone, and the middle of the nineteenth century had been reached before a connected treatise on private international law was written by an Englishman."[1]

Given that English traders began to extend their commercial activities over the seas in the middle of the sixteenth century, with the expansion of the British Empire in the eighteenth century and under the influence of several distinguished scholars (such as *Huber*, *Story*, *Westlake*, *Dicey* and *Cheshire*), English courts started to notice the importance of the choice of law rules. The development of the rules on choice of the proper law was illustrated in the case of *Robinson v. Bland.*[2] In this case, Lord Mansfield dismissed the application of the "place of contract" and "place of performance" tests and stated that the law to govern a contract is the law intended by the parties:

> "The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom."[3]

And,

---

[1] *Cheshire and North's on Private International Law*, (11th ed.) at p. 23.
[2] (1760) 1 Wm Bl 234, 2 Burr 1077.
[3] (1760) 1 Wm Bl 234, at pp. 258-259.

> "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed."[4]

During the period from the eighteenth century to 1990, the common law rules had the significant role in governing the issue of choice of the proper law. Accordingly, judges had to follow the common law rules to decide the proper law. However, this was altered in 1990 when most of the common law rules on choice of law in contract were superseded by those contained in the E.E.C. Convention on the Law Applicable to Contractual Obligations ("The Rome Convention") through the enactment of the Contracts (Applicable Law) Act 1990 ("the 1990 Act").[5]

Following the general choice of law rules, the judges have first to examine whether there is a choice of law clause expressed in the contract. If there is, and unless it contradicts the mandatory rules or public policy, judges are required to apply the express choice of law to decide the case in accordance with the theory of party autonomy. This principle can also be seen in Article 3(1) of the Rome Convention, which provides: "A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

According to Rule 175(1) of *Dicey and Morris on the Conflict of Laws*, based on party autonomy, "a contract is governed by the law chosen by the parties"[6] before the

---

[4](1760) 2 Burr 1077 at p. 1078.
[5]The Convention did not come into force in United Kingdom until April 1, 1991.
[6]Collins, *Dicey and Morris on The Conflict of Laws*, (12th ed. 1993), at p. 1211 (hereinafter *Dicey and Morris*).

English courts. This principle displaces the old presumption that the parties intended a contract to be governed by the law of the place where it was to be performed. Party autonomy is confirmed in several leading cases. For instance, in the case of *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*[7] where it had been argued that a choice of English law to govern a bill of lading was invalid because of lack of connection with England, Lord Wright decided that it was a "fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply."[8] Therefore, an expressed statement of the governing law of contract will be upheld, "provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[9]

The parties' freedom to choose the proper law was also endorsed by Lord Reid several decades later. As he stated in the case of *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.*:[10]

> "Parties are entitled to agree what is to be the proper law of their contract ... There have been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled."[11]

Although this principle has overwhelming support, a small minority of judges have expressed their reservations. First, they have argued that an express choice of law made by the parties should be regarded as one of the indications pointing to the proper law of the contract.[12] Furthermore, that judges should take the entire circumstances

---

[7][1939] AC 277, at p. 299.
[8]*Ibid.* at p. 299.
[9]*Ibid.* at p. 290.
[10]*Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] AC 583.
[11]*Ibid.* at p. 603.
[12]*Boissevain v. Weil* [1949] 1 KB 484 (CA), at p. 490; also *The Hollandia* [1983] 1 AC 565, at p. 576.

into consideration before applying the parties' choice of the proper law of the contract.[13] Secondly, they have also argued that the choice of law should be invalid if the transaction had no connection with the country whose law is chosen as the proper law of the contract.

However, these arguments were dismissed by Lord Wright in the *Vita Food* case.[14] Lord Wright said that "connection with English law is not as a matter of principle essential".[15] Such an attitude is adopted in the Rome Convention. As a commentary on Article 3(3) of the Rome Convention states "When combined with Art. 3(1), it is implicit in Article 3(3) that a very wide freedom of choice of law is given to the parties to a contract. The law chosen need not in principle have any geographical or physical connection with the contract. It also appears to be the case that the rules of the Convention are brought into play if the only foreign element in the case is the choice of foreign law to apply to what is otherwise an entirely domestic transaction."[16]

In the case where no express choice was made by the parties, the proper law of the contract might be inferred according to the circumstances of the case and the terms and nature of the contract in terms of Article 3(1) of the Rome Convention which provides that the parties' choice can be "demonstrated with reasonable certainty by the terms of the contracts or the circumstances of the case." Where no express choice of law can be found in the contract, and cannot be inferred from the relevant circumstances, English judges are required to apply the so-called "most real and closest relationship" test, which was adopted by the Privy Council in 1950 in *Bonython v. Commonwealth*

---

[13] *The Hollandia* [1983] 1 AC 565, at p. 576 (Lord Denning); also, *Re Helbert Wagg & Co. Ltd.* [1956] Ch. 323, at p. 340 (Upjohn J.); *Anselme Dewavrin Fils et Cie v. Wilson and North-Eastern Ry. Shipping Co. Ltd.* (1931) 39 Ll L R 289.

[14] *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277.

[15] *Ibid.* at p. 290.

[16] Scottish Current Law Statutes, Chapter 36, at p. 19.

of Australia,[17] to decide which national law should be the proper law of the contract. This principle is also stipulated in Article 4(1) of the Convention, which states: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected."

Generally speaking, under both the common law rules and the Convention, the choice of law rules required to be followed by judges are similar to those applied by arbitrators. Nevertheless, compared to international commercial arbitrators, English judges are subject to more restrictions on the power to choose the proper law of contract. These restrictions can be illustrated by examples of application of the foreign laws and a-national principles.

7.1.1 Choice of the foreign law in the English courts

Generally speaking, the English courts are reluctant to reject the application of foreign law,[18] provided both parties' expert witnesses agree on the meaning and effect of the foreign law[19] and the evidence is not contradicted.[20] However, it has been a long established principle that foreign law is a matter of fact, rather than a matter of law, before the English courts. In a case where parties claim that a foreign law should be the proper law of the contract before the English courts the judge is required to treat this issue as a matter of fact. In other words, as a matter of fact, the foreign law

[17][1951] AC 201, 219.
[18]*Sharif v. Azad* [1967] 1 QB 605, 616 (CA) *Koechlin & Cie. v. Kestenbaum* [1927] 1 KB 616, 622, reversed on appeal but not on this point.
[19]*Bumper Development Corp. v. Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA).
[20]If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order to decide between the conflicting evidence. See *Bumper Development Corp. v. Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA) at p. 1371.

claimed by the parties has to be pleaded and proved. This requirement is expressed in Rule 18(1) in *Dicey and Morris on the Conflict of Laws.*[21] Rule 18(1) provides: "In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means."

According to Rule 18(1), a party who relies on a foreign law has to plead it in the same way as other facts he claims.[22] The party who based his claims on the basis of a foreign law has the burden to prove it.[23] Although there are different ways to prove foreign law,[24] generally speaking foreign law cannot be proved simply by putting the text of a foreign legislation before the court, nor by citing foreign decisions or books of authority.[25] In fact, instead of conducting research on their own about the foreign law claimed by the parties,[26] the English judges will simply consider the foreign statutes, decisions or books as referred to them by the expert witnesses.

In the cases where the parties fail to plead and prove the foreign law they claim, or introduce little or insufficient evidence, the court will simply assume that foreign law is identical to English law unless they are completely satisfied with the evidence placed before them. Moreover, they will decide the case as if it were a purely English case and apply English law to the case.[27] This principle can be seen in Rule 18(2) of *Dicey*

---

[21]*Dicey and Morris*, (12th ed. 1993), Chapter 9.
[22]*King of Spain v. Machado* (1827) 4 Russ. 225 239; *Ascherberg, Hopwood & Crew Ltd. v. Casa Musicale Sonzogno* [1971] 1 WLR 173 (CA).
[23]*Dynamit A. G. v. Rio Tinto Co.* [1918] AC 260, 295; *Guaranty Trust Co. of New York v. Hannay* [1918] 2 KB 623, 655.
[24]*Dicey and Morris*, (12th ed. 1993) Chapter 9 has a detailed discussion at pp. 230-23.
[25]*Nelson v. Bridport* (1845) Beav. 527, 542; Vol. 36 (1838-1866) English Report 48-55; *Buerger v. New York Life Assurance Co.* (1927) 96 L.J. KB 930, at pp. 940, 942; *Bumper Development Corp. v. Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA), at p. 1371.
[26]*Di Sora v. Phillipps* (1836) 10 H.L.C. 624, 640; Vol. 11 English report 1168; *Bumper Development Corp. v. Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA), at p. 1369.
[27]*Male v. Roberts* (1800) 3 Esp. 163; Vol. 6, (1793-1807) English Report 170; *Dynamit A. G. v. Rio Tinto Co.* [1918] AC 260, at p. 295; *The Parchim* [1918] AC 157 (PC), at p. 161; *The Colorado*

and Morris on the Conflict of Laws, which provides: "in the absence of satisfactory evidence of foreign law the court will apply English law to such a case."

Nevertheless, the issue of the pleading and proof of foreign law does not arise in international commercial arbitration cases. Generally speaking, the parties to an arbitration have the right to choose any law to govern their contract. With respect to what the content of the chosen proper law is, the parties do not need to plead and prove the applicable law as a matter of fact. In practice, it is the arbitrator's job to conduct his own research to find out what the chosen foreign law stipulates as to the relevant issues.

7.1.2 The application of a-national principles in the English courts

The second matter to be discussed is the different approaches towards the application of a-national principles held by English judges and arbitrators. As has been seen in previous chapters, in international commercial arbitrations the parties to a state contract prefer to choose the "general principles of law" or even public international law as the proper law of the contract. Meanwhile, a-national principles, such as the new *lex mercatoria* and amiable composition, are becoming popular choices among the international commercial community.

Nevertheless, this practice of applying a-national principles is not recognised by the English courts. The English courts, in fact, do not allow the application of a-national principles in the cases submitted to the courts. This approach is supported by Article

---

[1923] P. 102, 111. However, there is a statutory exception to this principle. if a case is governed by the law of some Commonwealth country, the court may order that law to be ascertained under the British Law Ascertainment Act 1859 if it regards such ascertainment as "necessary or expedient for the proper disposal of the action."

1(1) of the Rome Convention. Article 1(1) states that the reference to the parties' choice of "law" to govern a contract means a reference to the law of a country.[28] Moreover, Article 1(1) does not allow the choice or application of a-national principles, such as the new *lex mercatoria* or the general principles of law.[29] It is suggested that a choice of a-national principles cannot be regarded as a valid express choice of law under the Rome Convention.[30] This suggestion has been strongly supported by the English court. Thus, Lord Diplock said that the effect of contracts and the obligations and rights arising thereunder have to be referred to some system of private law since "contracts are incapable of existing in a legal vacuum".[31]

In relation to whether the English courts accept the application of a-national principles in international arbitral awards, a detailed examination will be given in the following section.

7.2 Acceptance of international commercial arbitral awards made on the basis of a-national principles by the English courts

As discussed in the previous chapters, a-national principles have been widely applied by international arbitral tribunals to cases of international commerce. Being influenced by literature and legislation which invoke liberal ideas about the operation of international commercial arbitration, they frequently apply the general principles of law, the new *lex mercatoria* or the concept of amiable composition to decide the

---

[28] *Dicey and Morris*, (12th ed. 1993), Chapter 9 at pp. 1218-1219.
[29] Cf. Lagarde 1991 *Rev.Crit.* at 300-301.
[30] *Dicey and Morris*, (12th ed. 1993), Chapter 9 at pp. 1218-1219.
[31] *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* [1984] AC 50, at p. 65, Per Lord Diplock; *E.I. du Pont de Nemours v. Agnew* [1987] 2 Ll L R 592 (CA), at p. 595.

disputes submitted to them. Nevertheless, the issue which arises from this kind of award is whether the different jurisdictions (both in countries with advanced arbitration systems and in those with less developed systems), support the application of a-national principles in international commercial arbitration. In this section, attention will be focused on the English courts' attitude to the recognition and enforcement of the awards made on the basis of a-national principles, such as the general principles of law, the new *lex mercatoria* and amiable composition.

As briefly outlined in the last section, the choice of law rules did not attract attention until the eighteenth century. Since England was a single nation with a single common law, international conflicts were precluded by the rule that the common law courts were unable to entertain foreign causes. Therefore, any complaints filed by foreigners and the issue of whether he was entitled to his protection had to be decided by the special courts established by the King.[32] During that time, no question of application of the foreign or even English law arose, since the law merchant which was regarded as a universally binding system was applied to each of the cases involving international trade disputes.

This special application ceased around the nineteenth century when the international nature of this law had been incorporated into one of the branches of municipal English law.[33] Meanwhile, the application of foreign law to the cases has been accepted by the English courts provided such an application was necessary.[34] In other words, the

---

[32]*Cheshire and North's on Private International Law*, (11th ed.) at p. 23.
[33]*Ibid.* at p. 24.
[34]But the foreign law needed to be proved as discussed in the last section of this chapter.

English courts changed their views and came to hold that the term "rules of law" could not only be English law but also the law of any State.[35]

The English courts insisted on the need for arbitrators to apply the "rules of law". As expressed in the early cases, in England "There is no doubt that an arbitrator is bound by the rules of law like every other judge, and if it appears on the face of the record that the arbitrator has acted contrary to law, his award may be set aside."[36] The principle was established that the common law had jurisdiction to set aside awards for *ex facie* error of law in the nineteenth century and was strongly supported by the later jurists and judges,[37] such as Denning L.J. (as he then was) who said: "there is not one law for arbitrators and another for the court. There is one law for all."[38]

Despite efforts to invoke a more liberal attitude towards international commercial arbitration, an application of rules of law to arbitration cases was one of the requirements to allow the English courts to enforce awards. Accordingly, it was noted that not only did a close relationship between arbitration and the courts exist but also a desire of the courts to supervise the arbitration procedures prevails in the English courts. Mr. Thomas provided an explanation for this situation:

> "The underlying policy probably emanates from the fact that arbitration, albeit predominantly consensual and voluntary, is nonetheless perceived as a fragment of the administration of civil justice and in common with all its other component parts must function in accordance with legal principles. The adoption of this principle ensures that arbitrations can be effectively supervised; that the total arbitral decision-making process functions with at

---

[35]*Bulk Oil (ZUG) A.G. v. Sun International Ltd.*, [1983] 1 Ll L R 655. In this case, Bingham J. upheld the arbitrator's decision to apply European Community law as the proper law of the contract.
[36]*Aubert v. Maze* (1801) 2 Bos. & Pul. 371, 375. See also *Morgan v. Mather* (1792) 2 Ves Jun. 15; *Kent v. Estob* (1802) 3 East 18; *Blennerhasset v. Day* (1811) 2 Ball & B. 104; *Hodgkinson v. Fernie* (1857) 3 C.B. (N.S.) 189.
[37]Thomas, *The Law and Practice Relating to Appeals from Arbitration Awards*, (1994).
[38]*David Taylor & Son Ltd. v. Barnett Trading Co.* [1958] 1 WLR 562, at p. 570.

> least a substantial degree of consistency; and that a fair balance is maintained between arbitrating parties.[39]

This idea was not only supported by the academics but also by the judges from the English courts, such as Lord Goddard C.J. who said that "*prima facie* the duty of an arbitrator is to act in accordance with the law of the land."[40] Unlike some countries in continental Europe, such as Belgium and France, English courts did not go as far as these countries did in expressly adopting the application of a-national principles in international commercial arbitration. While a-national principles are frequently applied to international commercial arbitration cases in practice, the request for recognition and enforcement of arbitral awards made on the basis of a-national principles caused a great deal of controversy in the English courts.

7.2.1 The application of the general principles of international law

While English judges are not allowed to apply a-national principles to disputes submitted to them, frequently arbitrators are empowered to decide the disputes on the basis of legislation, common law, equity and the principles of public international law with the parties' agreement.[41] Among these, the general principles of international law are frequently chosen as the proper law of the contract. This is especially so in the case of state contracts. As mentioned in Chapter Four, it may be due to the fact that no agreement is reached between the parties or neither party wants to have the contract

---

[39]Thomas, *The Law and Practice Relating to Appeals from Arbitration Awards*, (1994); also see *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478 (CA); *Orion Cia. Espanola de Seguros v. Belfort Maat. etc.* [1962] 2 Ll L R 257.

[40]*Podar Tading Co. v. Tagher* [1942] 2 KB 277, at p. 288. See also, *Hooper & Co. v. Balfour, Williamson & Co.* (1890) 62 L.T. 646; *Mitchell Gill v. Buchan*, 1921 SC 390; *N.V. Vulcaan v. Mowinckels Rederi A/S* [1938] 2 All E R 152; *David Taylor & Son Ltd. v. Barnett Trading Co.* [1953] 1 W.L.R. 562; *Techno-Impex v. Gebr. van Weelde Scheepvaartkantoor B.V.* [1981] 2 All E R 669.

[41]*Vulcaan (N.V. etc.) v. Mowinckels Rederi A/S* [1938] 2 All. E.R. 152; *Orion Cia. Espanola de Seguros v. Belfort Maat. etc.* [1962] 2 Ll L R 257.

governed by the national law of the other. This choice has been applied in a number of well-known cases concerning oil concession contracts, such as the *Sapphire*,[42] *AMINOIL*,[43]. *ARAMCO*,[44] *BP*,[45] *LIAMCO*,[46] and *TEXACO*[47]arbitrations.

In England, traditionally, public international law was regarded as the law governing relations between sovereign states, rather than between private parties. In accordance with this concept, private parties could not properly be the subjects of public international law. Consequently, this kind of choice could be challenged before the English courts if private parties sought to have their contracts governed by public international law.

Nevertheless, this hostile attitude towards the application of public international law has been partially modified. In the last twenty years, a choice of the "general principles of international law" which indicates public international law is only valid in conjunction with the application of a municipal law. In other words, the choice of public international law has been recognised as a valid choice provided that it is incorporated into the English law. This idea can be observed in the judgment made by Scarman L.J. in the case of *Thai-Europe Ltd. v. Pakistan Government*,[48] concerning the issue of sovereign immunity. As he observed:

---

[42]*Sapphire International Petroleum Ltd. v. The National Iranian Oil Company*, (1964) 13 *I.C.L.Q.* 1011.
[43]*American Independent Oil Company Inc. v. The Government of the States of Kuwait*, 21 *I.L.M.* 976 (1982).
[44]*Saudi Arabia v. Arabian American Oil Company* (1963) 27 *I.L.R.* 117.
[45]*British Petroleum (Libyan) Ltd. v. The Government of the Libyan Arab Republic*, (1979) 53 *I.L.R.* 297.
[46]*Libyan American Oil Company v. The Government of the Libyan Arab Republic*, (1982) 62 *I.L.R.* 140.
[47]*Texas Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, 17 *I.L.M.* 3 (1978).
[48][1975] 1 WLR 1485.

> "I think it is important to realise that a rule of international law, once incorporated into our law by decisions of a competent court, is not an inference of fact but a rule of law. It therefore becomes part of our municipal law and the doctrine of *stare decisis* applies as much to that as to a rule of law with a strictly municipal provenance."[49]

This judgment was upheld in the case of *Amin Rasheed Corp. v. Kuwait Insurance Co.*,[50] where the House of Lords decided that a combination of national law and international law as the proper law of a state contract could be a successful choice of the proper law before the English courts.[51] The House also stressed that public international law cannot be applied alone, "except by reference to the system of law by which the legal consequences ... [are] to be ascertained."[52]

This decision was also confirmed in a latter case of *Dallal v. Bank Mellat.*[53] In this case, relying on *The Laconia* case[54] and *Messina v. Petrococchino,*[55] Hobhouse J. stated:

> "If private law rights are to exist, they must exist as part of some municipal legal system, and public international law is not such a system. If [it] is to play a role in providing the governing law which gives an agreement between ... individuals legal force, it has to do so by having been absorbed into some system of municipal law.[56]

---

[49]*Ibid.* at p. 1495; also see *The Cristina* [1938] AC 485, 497.

[50][1984] AC 50; also see *Dallal v. Bank Mellat* [1986] QB 441; [1986] 2 WLR 745 and *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529, 554.

[51]As to the issue of which system of law should be chosen to combine with public international law as the proper law of a contract, following the traditional view the *lex fori* has always had a great significance when the courts try to decide the issue. That is, with the belief that state contracts must be governed by the national law, the application of the substantive law of the *lex fori* as the governing law is usually presumed by the English courts and commentators. It is supported by the case of *Tzortzis v. Monarck Line A/B* [1986] WLR 406 (CA) and Park, "The *Lex Loci Arbitri* and International Commercial Arbitration: When and Why Does It Matters" (1983) 32 *I.C.L.Q.* 21 at p. 24. Also as *Dicey and Morris* comments: "When the arbitration clause is part of a contract, there is a very strong presumption that the proper law of the contract (including the arbitration clause) is the law of the country in which the arbitration is to be held." (*Dicey and Morris,* Vol. 2 at p. 1127).

[52]*Amin Rasheed Corp. v. Kuwait Insurance Co.* [1984] 1 AC 50, at pp. 60-65.

[53][1986] QB 441; [1986] 2 WLR 745.

[54](1863) 2 Moore PC (NS) 161.

[55](1872) L.R. 4 PC 144.

[56][1986] QB 441; [1986] 2 WLR 745, at p. 759.

In the cases involving international commercial arbitration, the courts sometimes tend to interpret the term "general principles of international law" as the commercial principles existing in international trade, rather than the rules governing the relationship between states. These principles are under different names in different legal literature, such as the new *lex mercatoria*, law merchant, international trade law ... and so on. Nevertheless, the application of the new *lex mercatoria* is also controversial among the academics and judges. This long-running debate concerning the validity of a choice of the new *lex mercatoria* as the proper law of the contract before the English courts will be discussed in the following section.

7.2.2 The application of the new *lex mercatoria*

While international arbitral tribunals frequently apply the new *lex mercatoria* to disputes arising from international commerce, the English courts did not reach an agreement on this issue until one decade ago. Generally speaking, before the *Rakoil* case,[57] the English courts held a rather negative attitude towards the enforcement of awards made on the basis of the new *lex mercatoria*. Primarily, in England, arbitrators are required to follow the rules of law regarding procedure and evidence, as well as the rules of the substantive law. Apart from having no power to make an award based on their personal feeling of justice[58] as would be the case on the continent, the attitude of the English courts towards the application of the new *lex mercatoria* has been cautious.

---

[57]*Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)* [1987] 3 WLR 1023.

[58]David, *English Law and French Law -- A Comparison in Substance Tagore Law Lectures*, (1980), at p. 147.

In England, the new *lex mercatoria* was not regarded as law because it is lacking in definition. Consequently, the awards decided on the basis of the new *lex mercatoria* were not enforced before the English courts.[59] This argument has been strongly supported by Lord Mustill. He said that, first of all, arbitrators cannot apply the new *lex mercatoria* on their own. Secondly, an agreement made by the parties to submit their disputes to arbitration pursuant to the new *lex mercatoria* or its English equivalent is void. Finally, an award rendered by arbitrators according to the new *lex mercatoria* ought not to be enforced in the English courts, at least if the award is required to be enforced by the New York Convention. He refused the application of the new *lex mercatoria* because of its uncertainty and said:

> "To my mind, the whole purpose of a contract being regarded as enforceable in law is that the parties can ascertain their rights and duties by reference to some external objective standard, before any dispute has risen, and can be confident that if a dispute does arise those rights and duties will be enforced as they stand. There cannot be a contract which is governed by no law at all."[60]

This hostile attitude towards the application of the new *lex mercatoria* can easily be found in a number of English cases. For instance, as early as 1922, this notion can be seen in the case of *Czarnikow v. Roth Schmidt & Co.*,[61] where the disputes arose from a contract for the sale of sugar. A choice of law clause was contained in article 19 of the contract, in the following terms:

> "Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid shall require, nor shall they apply to the Court to require, any arbitrators to state in the form of a special case of the opinion of the Court any question of law arising in the reference, but such question of law shall be determined in the arbitration in manner herein directed."

---

[59]Mustill, "Contemporary Problems in International Commercial Arbitration: A Response", (1989) 17 *Int'l Bus. Law* 161, at pp. 161-162.
[60]*Ibid.* at p. 161.
[61][1922] 2 KB 478.

Bankes L.J. decided that the underlying agreement between the parties was contrary to public policy and was invalid on the ground that the statutory jurisdiction of the Courts under the Arbitration Act 1889 was ousted, and public policy required the arbitrators to apply a fixed and recognisable system of law. He explained:

> "Among commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity. I entertain no doubt, as long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator to secure that the law that is administered by the arbitrator is *in substance the law of the land, and not some home-made law of the particular arbitrator or the particular association.* To release real and effective control over commercial arbitration is to allow the arbitrator or the arbitration tribunal to be the law unto himself or themselves, to give him or them a free hand to decide according to law, or not according to law as he or they think fit; in other words, to be outside the law."[62] (emphasis added)

However, following the fast development of international commercial arbitration, as strongly suggested by the believers of the new *lex mercatoria*, the English courts have been advised to enforce the awards based on the new *lex mercatoria* in order to keep pace with the rapid development of international commercial arbitration.[63] From an historical perspective, the believers in the new *lex mercatoria* argue that the dominance of the common law courts did not abolish the law merchant, as shown in a number of cases which date back several centuries. Among the academics, in 1936 Mr. Philip provided the evidence of the absorption of the law merchant into the municipal law of England, when he said:

> "With the accession of Coke as Chief Justice in 1606, began a period during which the law merchant in England was absorbed gradually into the common law. The King's judges, always jealous of the special tribunals of the merchants, usurped their functions and took over their law ... If the process of absorption thus resulted inevitably in the increasing desuetude of the purely commercial courts, the consequences on the substantive side were likely to be equally marked. The customary doctrines of the law merchant could not be

---

[62][1922] 2 KB 478 at 484.

[63]Rivkin, "Enforceability of Arbitral Awards Based on *Lex Mercatoria*", (1993) 9 *Arbitration Int.* 67, at pp. 73-80.

> fitted in all cases into the more rigid framework of the common law without distortion. In more than one direction that was bound to backgrounds peculiarly English and divorced from any international influences. With the conclusion of the period of absorption, therefore, the commercial law of England still might be based fundamentally on the customs of merchants, and to that extent might retain a cosmopolitan flavour as its chief distinction ..."[64]

The same opinion was maintained by Sir William Holdsworth who suggested that a significant economic development had been reflected by a blurring of the lines between merchant and non-merchant and a comparable merging of mercantile law with the common law of England.[65]

From the point of view of practice, the believers in the new *lex mercatoria* took the case of *Woodward v. Rowe* [66] as a starting point for their arguments. In this case, the court not only dismissed the defendant's argument that the plaintiff relied on "only a particular custom among merchants, and not common law",[67] but also allowed the application of the new *lex mercatoria* since "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant."

Also in the case of *Hutton v. Warren*[68] the court was of the opinion that the new *lex mercatoria* was playing an important role in international commercial disputes by supplying the customary practices that would be used as a guideline in interpreting and enforcing contractual obligations. It is a role similar to that played by customary practices in domestic law. As the court stated:

---

[64]Thayer, "Comparative Law and the Law Merchants", 6 *Brook.L.Rev.* 139 (1936), at pp. 142-143.
[65]Holdsworth, *History of English Law*, (7th ed. 1956), at p. 572.
[66](1666) 2 KB 132, 84 English Report 84.
[67]*Ibid.* 133.
[68](1836) 1 M & W 466, 150 English Report 517.

> "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle or presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."[69]

Again, the court, relying on a custom of the country on cultivation and the terms of quitting with respect to allowances for seed and labour, decided that the plaintiff and defendant were bound by it even after the lease expired, since this custom was clearly applicable to a tenancy from year to year, and, by implication, had been imported into the lease.

Despite the objections to the application of the new *lex mercatoria*, in some recent cases during last decade the application of the new *lex mercatoria* has been confirmed. In the leading case of *Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)*,[70] an agreement for the exploration of oil contained a clause providing for the settlement of all disputes by three arbitrators appointed in Geneva under the rules of the I.C.C., and the determination of the proper law to be applied to the contract was left to the arbitrators. The arbitrators decided to choose "internationally accepted principles of law governing contractual relations" as the proper law and made the final award in favour of the plaintiffs. The losing party argued before the Court of Appeal that the enforcement of the award would be against English public policy because the award was not decided on the basis of any national law. The Court of Appeal dismissed the defendants'

---

[69] *Ibid.* 475, 150 English Report 517, at p. 521.

[70] *Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)* [1987] 3 WLR 1023.

appeal concerning the proper law and upheld the arbitrators' choice of "internationally accepted principles of law" to govern contractual relations between the parties, since it did not lead to the conclusion that the parties did not intend to create legally enforceable rights and obligations. Accordingly, such a choice did not affect the validity of the award under Swiss law which was the procedural law of the arbitration and the law governing the arbitration agreement; moreover, the enforcement of the award would not be contrary to English public policy. With regard to public policy, Sir John Donaldson M.R. suggested that as long as the parties intended to create legally enforceable rights and obligations, a request for enforcement of an arbitral award made on the basis of a system of law which was not that of England or of any other state or was a serious modification of such a law would be granted.[71] As he stated:

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.[72]

And,

> "Asking myself these questions, I am left in no doubt that the parties intended to create legally enforceable rights and liabilities and that the enforcement of the award would not be contrary to public policy."[73]

Furthermore, it is followed by a discussion on the certainty of the clause of choice of law:

> "By choosing to arbitrate under the Rules of the ICC and, in particular, art. 13.3, the parties have left the proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators' choice of proper law, a common denominator or principles underlying the laws of the various nations governing

---

[71] *Ibid.* [1990] 1 AC 295, at pp. 315-316; [1987] 3. WLR 1023 at pp. 1035-1036.
[72] *Ibid.* at p. 1035.
[73] *Ibid.* at p. 1035.

> contractual relations, is outwith the scope of the choice which the parties left to the arbitrators."[74]

This case also provides a positive answer to the question of whether the English courts hold a similar attitude towards the cases where the application of the new *lex mercatoria* is on the arbitrators' own initiative rather than on the basis of the parties' agreement.

Two years later, in an *obiter dictum*, a positive attitude was expressed by Lloyd L.J. concerning the question of whether an award in the form issued in the *DST v. Rakoil* case would equally be upheld if it had been issued in England.[75] He emphasised that, by insisting on the application of a fixed and recognised system of law, "no ICC arbitration could ever be held with confidence in this country for fear that the arbitrators might adopt the same governing law as they did in *DST v. Rakoil.*"[76] Furthermore, he stated: "If the English Courts will enforce a foreign award where the contract is governed by 'a system of law which is not that of England or any other state or is a serious modification of such a law,' why should it not enforce an English award in like circumstances?"[77]

In addition, a friendly attitude towards the application of the new *lex mercatoria* in arbitration can be observed in the *Channel Tunnel* Case.[78] In this case, the plaintiffs employed the defendants to construct a cooling system in a tunnel which was also under construction under the English Channel between England and France.

---

[74]*Ibid.* at p. 1035.
[75]*Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (UK) Ltd.* [1989] 1 Ll L R 473, at pp. 488-489.
[76]*Ibid.* p. 489.
[77]*Ibid.* p. 489.
[78]*Channel Tunnel Group v. Balfour Beatty Ltd.* [1993] AC 334; [1993] 2 WLR 262.

However, a dispute arose as to the amounts payable in respect of the work on the cooling system. The House of Lords dismissed the appeal made by the plaintiffs and stated that the court had an inherent power to stay proceedings brought before it in breach of an agreement to decide disputes by an alternative method; especially, since the procedure for resolving disputes had been agreed between the parties and fell within section 1 of the Arbitration Act 1975. The judges did not challenge the choice of law clause which contained an application of the new *lex mercatoria* to the contract which stipulates:

> "The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the principles common to both English law French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals."

In fact, Lord Mustill confirmed that it was by now firmly established that more than one national system of law may bear upon an international arbitration to regulate the substantive rights and duties of the parties.[79]

The most important message revealed from the *Channel Tunnel* case was that Lord Mustill, who was regarded as the leading representative of the non-believers in the new *lex mercatoria,* expressed a more understanding view about the application of a-national principles. He said that, under the special circumstances and needs of the Channel Tunnel venture, it may be the right choice for the parties to choose an indeterminate "law" to govern their substantive rights. Also, he concluded that no matter whether this choice of law was right or wrong, it was the choice which the parties had made; moreover, he believed that ordering an injunction in this case would be to act contrary both to the general tenor of the construction contract and to the spirit

[79] *Ibid.* [1993] AC 334, at p. 357.

of international arbitration, though the courts could and should in the right case provide reinforcement of the arbitral process.[80] Furthermore, the court simply directed the parties to resolve their disputes by means of arbitration without expressing any objection about the potential application of the new *lex mercatoria*, that is, the general principles of international trade law. Such a friendly attitude is also embodied in section 46 of the 1996 Arbitration Act.

In comparison with the French Courts, the English Courts hold a more cautious, or even hesitant, attitude towards the application of the new *lex mercatoria* in international commercial arbitration cases. Nevertheless, from the evidence showing a certain degree of relaxation of the resistance towards the application of the new *lex mercatoria* in the cases, legislation and literature (especially after the *Channel Tunnel* case and the 1996 Arbitration Act) it is believed that the application of the new *lex mercatoria* is allowed in the English courts.

7.2.3 The application of the notion of amiable composition

Amiable composition, a device which originated and developed in France and other civil law countries, is a less established concept in the common law countries.[81] England is no exception to this. Especially, the enforcement of awards rendered on the basis of amiable composition is a matter of disagreement among the English jurists and judges. Generally speaking, in common law jurisdictions and in England, such clauses are often called "equity clauses".[82] Though the English courts have

---

[80] *Ibid.* 1993] AC 334, at p. 363; [1993] 2 WLR 262, at p. 291.

[81] Born, *International commercial arbitration in the United States*, (1994), at p. 135.

[82] Maccom, *The Law of Insurance*, (1989), at pp. 16-17. However, Michael Kerr claims that *amiable composition*, though a kind of equity clause, should be regarded as a contract between the parties. See Kerr, "Equity Arbitration in England", 2 (4) *The American Review of International Arbitration*, 377 (1993).

encountered the issue of amiable composition several times, they have failed to provide a clear indication about the issue, and, the answers given have fluctuated.

The application of amiable composition can be traced back to a time two centuries ago. At that time, it was the judges who explicitly acknowledged that arbitrators did not need to apply the strict law if its application would have produced a harsh result. This idea can be seen as early as 1791, in the case of *Knox v. Symmonds*,[83] where the Lord Chancellor expressed his opinion in these words: "the arbitrator has a greater latitude than the court in order to do complete justice between the parties for instance he may relieve against a right which bears hard upon one party, but which having been acquired legally and without fraud, could not be resisted in a Court of Justice."[84]

Almost a century later, the case of *Rolland v. Cassidy*,[85] a Canadian appeal concerning a clause of amiable composition, was brought to the Privy Council. While accepting the validity of the clause, the court also referred to the expression *amiable compositeurs* under Article 1346 of the Code of Civil Procedure which stated: "Arbitrators must hear the parties, and their respective proofs, or establish fault against them, and decide according to the Rules of law, unless they are dispensed from doing so by the terms of the submission, or unless they have been appointed as '*amiable compositeurs*.'" In other words, *amiable compositeurs* were to be exempt from the strictness of the obligations imposed by law. Moreover, the Earl of Selbourne advised:

> "Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as *amiables compositeurs* to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have

[83](1791) 1 Ves. Jun. 369, 30 English Report 390.
[84]*Ibid.* 370, 30 English Report 390, at p. 391.
[85](1888) 13 AC 770.

> some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."[86]

He also went on to say:

> "..., and being *amiables compositeurs*, and not bound to proceed with strict form and regularity in everything, though they were, as their Lordships assume, bound to proceed according to the substantial rules of justice."[87]

Such a liberal approach was followed in *Jager v. Tolme and Runge*.[88] A phrase "appeal to the council for a decision" was found in the contract and challenged by the defendant on the ground that such language had given the council the powers to make a new contract between the parties on the basis of what they thought was fair and reasonable. Pickford L.J. neither agreed with the defendant's argument, nor disputed the validity of the clause. He simply pointed out that such a clause ought to be expressed in the clearest possible terms if it is to have such an effect.[89] The same opinion was also expressed by Lord Phillimore in a later case in which he determined that arbitrators, provided no special directions are given limiting or conditioning their functions, might be empowered to depart from the strict rules of the law.[90]

Nevertheless, about the same period, the admission of the amiable composition clause was seriously questioned by Bankes L.J. in *Czarnikow v. Roth Schmidt & Co.*[91] He expressed doubts about amiable composition, saying:

> "... I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land,

---

[86] *Ibid.* at pp. 772-773.
[87] *Ibid.* at p. 774.
[88] [1916] 1 KB 939.
[89] *Ibid.* at p. 957.
[90] *Board of Trade v. Cayzer Irvine & Co.* [1927] AC 610, at pp. 628-629.
[91] [1922] 2 KB 478.

> and not some home-made law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitrations is to allow the arbitrator, or the arbitration tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law."[92]

He also indicated that the courts "do not allow the agreement of private parties to oust the jurisdiction of the King's Courts. Arbitrators, unless expressly otherwise authorised, have to apply the laws of England. ... There must be no Alsatia in England where the King's writ does not run."[93]

Scrutton L.J. also expressed certain doubts in this case. He believed that commercial men would make a great mistake if they ignored the importance of administering settled principles of law in commercial disputes,[94] by putting their cases into the hands of fellows businessmen who did not have the necessary legal knowledge, but were prepared to decide the cases by departing from the principles of law.[95]

Furthermore, the judgment delivered by the Court of Appeal in *David Taylor & Son Ltd. v. Barnett Trading Co.*[96] was another example of hostility to the application of amiable composition. In this case, a dispute which arose from an illegal contract for the sale of Irish stewed steak was referred to arbitration. The umpire found in favour of the plaintiff, but failed to give a reason for his award. The Court of Appeal decided to set aside the award because of the umpire's misconduct in law. Denning L.J. (as he

---

[92]*Ibid.* at p. 484-485.
[93]*Ibid.* 488.
[94]The importance was also stressed by Atkin L.J. in this case, at p. 491.
[95][1922] 2 KB 478, at p. 489.
[96][1953] 1 WLR 562, at p. 568.

then was) refused to enforce the contract and also postulated that "there is not one law for arbitrators and another for the court. There is one law for all."[97]

In addition, Singleton L.J. supported Denning's opinions and stressed that, rather than according to what an arbitrator may consider fair and reasonable in the circumstances, the duty of an arbitrator was to decide the question submitted to him according to the legal rights of the parties.[98] Moreover, he suggested that "if an arbitrator knows that a contract is illegal, and thereafter proceeds to make an award upon a dispute arising under that contract, he is guilty of that which is in law misconduct."[99]

With a great deal of support from his fellow judges, Megaw J. went further than the case law in the *Orion* case.[100] In this case, a dispute arising from a quota share non-marine reinsurance treaty was referred to arbitration. An arbitration clause was provided: "The Arbitrators and Umpire are relieved from all judicial formalities and may abstain from following the strict rules of the law. They shall settle any dispute under this Agreement according to an equitable rather than a strictly legal interpretation of its terms and their decision shall be final and not subject to appeal." Megaw J. explicitly ruled that, under English law, it would be against public policy for the arbitrators not to apply to the case a fixed and recognisable system of law (English law in his opinion), and stated:

> "If the parties choose to provide in their contract that the rights and obligations shall not be decided in accordance with law but in accordance with some other criteria, such as what the arbitrators consider to be fair and reasonable,

---

[97] *Ibid.* at p. 570.
[98] *Ibid.* at p. 565.
[99] *Ibid.* at p. 566.
[100] *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen* [1962] 2 Ll L R 257.

> whether or not in accordance with law, then, if that provision has any effect at all, its effect, as I see it, would be that there would be no contract, because the parties did not intend the contract to have legal effect - to affect their legal relations. If there were no contract, there would be no legally binding arbitration clause, and an 'award' would not be an award which the law would recognise."[101]

Therefore,

> "The conclusion which I draw from those judgements is that it is the policy of the law of this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognisable system of law, which primarily and normally would be the law of England, and that they cannot be allowed to supply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles, which, of course, does not mean "equity" in the legal sense of the word at all."[102]

Nevertheless, instead of being followed in later cases, Megaw J.'s judgment has been criticised by some of these. For instance, Lord Denning M.R. argued that the arbitrator's decision would be final and binding if the arbitrator was directed to "interpret this agreement and the rights and duties of the parties rather as honourable undertakings than by strict rules of law."[103] Again, in the *Eagle Star Insurance* case, where a dispute arose from a reinsurance treaty, he decided that a clause conferring upon arbitrators the powers not to be bound by strict legal principles but to settle any differences referred to them according to an equitable legal interpretation of the provisions of the agreement was reasonable and valid. He observed:

> "I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is a perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for parties so to agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do under such a clause as this."[104]

---

[101] *Ibid.* at p. 264.
[102] *Ibid.*
[103] *River Thames Insurance Co. Ltd. v. Al Ahleia Insurance Co. S.A.K.* [1973] 2 Ll L R 2, at p. 7.
[104] *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Ll L R 357, at p. 362.

Moreover,

> "So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than as strict legal interpretation."[105]

In the matter of awarding interest, this positive attitude was also supported in a later case where the issue was whether under common law interest could be claimed by way of damages in respect of a late or withheld payment due under the contract.[106] The Court upheld that an arbitrator has power to apply common sense to claims for interest and is not debarred by the Law Reform (Miscellaneous Provisions) Act 1934 from awarding damages by way of compound interest.[107] As Lord Denning concluded:

> "In my opinion the arbitrators in the City of London are not bound by the strict rules of the common law courts or of the statutes applicable to them, for this simple reason: that those are rules of practice only which do not govern the practice of arbitrators. Arbitrators have a wide discretion to award interest whenever it is just and equitable to do so."[108]

The decision was followed by the case of *Home Insurance Co.*[109] where the defendants argued that due to lack of authority to make a contract, the agreement was binding in honour only and not in law. On the contrary, the plaintiffs claimed that the

---

[105]*Ibid.* Considering the contradictory opinions in the *Orion* and *Eagle Star* cases, Donaldson MR in the case of *Dutsche Schachtbau-und Tiefbohrgesellschaft M.B.H. v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.* [1988] 2 Ll L R 293, provided three guidelines to examine equity clauses. That is, the court had to be satisfied that the parties intended to create legally enforceable rights and obligations, that the resulting agreement would constitute a sufficiently legally enforceable contract and that the enforcement of the award would not be contrary to public policy.

[106]*Tehno-Impex v. Gebr van Weelde Scheepvartkantoor B.V.* [1982] 3 All ER 669.

[107]*Ibid.* The Master of the Rolls, Lord Denning, went further. He even held that arbitrators are not bound by the strict rules of the Common law Courts and have "a wide discretion to award interest whenever it is just and equitable to do so. This discretion covers the rate of interest and the period for which it should be allowed, no matter whether the principal sum is paid before or after the arbitration has started, of before or after the award is made."

[108][1982] 3 All ER 669, at p. 678.

[109]*Home Insurance Co. and St. Paul Fire and Marine Insurance Co. v. Administratia Asigurarilor de Stat* [1983] 2 Ll L R 674.

agreement was valid. An arbitration clause was contained in the agreement between the parties. The clause provided: "This treaty shall be interpreted as an honourable engagement rather than as a legal obligation and the award shall be made with a view to effecting the general purpose of this treaty rather than in accordance with a literal interpretation of its language..." After considering the evidence, Parker J. dismissed the defendant's contention that the agreement had no legal effect, and said that: "It is plain that it was the common intention that there should be an enforceable obligation to arbitrate and to abide by the award. All that was intended was to free the arbitrators to some extent from strict rules and this, on the authority of the *Eagle Star* case, is permissible."[110]

Following this new development, however, some judges disagree with the idea which frees arbitrators from the strict rules of law without more cautious considerations. For instance, in *Overseas Union Insurance Ltd. v. A.A. Mutual Insurance Co. Ltd.*[111] Evans J. criticised the judgments made in the *Eagle Star* and *Home Insurance* cases. Holding a more circumspect attitude towards the equity clause embodied in the arbitration clause, he not only expressed his doubts, but also pointed out that the two previous judgments mentioned above did not clarify how far an equity clause can go. He observed:

> "..., the effect of the equity clause is not clearly settled as a matter of law. ... Although the clause may entitle the arbitrators "to view the matter more leniently" sc. than a court would do, I am doubtful whether they can embark on any other inquiry than what the law requires, namely finding the natural and proper meaning of the words used, in the particular context."[112]

---

[110] *Ibid.* at p. 677.
[111] [1988] 2 Ll L R 63.
[112] *Ibid.* at p. 72.

Further scepticism about the equity clause was added by the case of *Home and Overseas Insurance Co. v. Mentor Insurance*.[113] This case involved a dispute arising from reinsurance contracts between the parties. Under clause 18 of the insurance contracts, the arbitration clause mandated arbitrators to "make their award with a view to effecting the general purpose of this reinsurance in a reasonable manner rather than in accordance with a literal interpretation of the language." Parker L.J. dismissed the appeal and directed the parties to go to arbitration. He expressed no hesitation in accepting the argument that "a clause which purported to free arbitrators to decide without regard to the law and according, for example, to their own notions of what would be fair would not be a valid arbitration clause."[114] Nevertheless, he did not think that the arbitration clause in this case did any such thing.[115] Furthermore, it simply appeared to do no more than give the arbitrators liberty to do that which was approved by the guidelines set by Lord Denning in the *Antaios* case which contained the words "I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense."[116]

However, in an *obiter dictum* Lloyd L.J. expressed his approval of the equity clause. He said: "I see no reason why the parties should not require the arbitrators to adopt, in the words of Lord Justice Robert Goff, the more lenient view, even if a Court would likely to adopt a stricter view."[117] He went on to say: "I do not see why it should not be open to arbitrators, when so required to determine the rights of the parties in

---

[113] *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (UK) Ltd.* [1989] 1 Ll L R 473.
[114] *Ibid.* p. 485.
[115] *Ibid.* p. 485.
[116] *Antaios Compania naviera S.A. v. Salen Rederierna A.B.* [1984] AC 191 (HL).
[117] *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (UK) Ltd.* [1989] 1 Ll L R 473, at p. 487.

accordance with the 'general purpose' of the reinsurance, in order to resolve a contractual 'ambiguity' in the wider sense."[118]

While some foreign jurisdictions, such as France and the United States, have already accepted or are prepared to accept the transnational arbitral decisions when an express mandate to decide was authorised by the parties, English courts held a rather hesitant or even hostile attitude towards this issue. As the remarks made by Megaw J.[119] show, he believes that "it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognisable system of law..."

Nevertheless, the confusion concerning the application of amiable composition was eventually cleared by the enactment of the 1996 Arbitration Act. With the intention of enhancing the competitiveness of the arbitration industry in England and Wales, the Arbitration Act 1996 sweeps away the Arbitration Acts of 1950, 1975, and 1979. In the new Act, section 46 provides provision for the rules applicable to the substance of the dispute. In accordance with section 46(1)(b), "the arbitral tribunal shall decide the dispute if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal." This section can be construed in favour of the notion of "amiable composition". It is suggested that this section means that "the parties might want their dispute decided not under a recognised system of law but under what are often referred to as "equity clauses", which is not uncommon in international commercial contracts."[120] The reason why the term 'amiable

---

[118] *Ibid.* p. 488.
[119] *Orion Cia. Espanola de Seguros v. Belfort Maat. etc.* [1962] 2 Ll L R 257, at p. 264. See also *Maritime Insurance Co. v. Assekuranz-Union von 1869* (1935) 52 Ll L R 16; *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co.* (UK) Ltd. [1989] 1 Ll L R 473 (CA).
[120] Rutherford and Sims, *Arbitration Act 1996: A Practice Guide*, (1996), para. 46.4.

composition' or deciding the case '*ex aequo et bono*' is not used is because "the expressions do not derive from English law or arbitration practice and it was felt inappropriate to incorporate them into the Act, all the more so since Latin and French phrases have been studiously avoided in the Act in the interests of simplicity and understandability."[121]

[121] *Ibid.* para. 46.5.

Chapter Eight

Whether the French courts accept the application of a-national principles in international commercial arbitral awards

8.1 The hostile attitude in French legal history

The French courts have always tried to satisfy demands for a liberal framework of international commercial arbitration. Nevertheless, similar to the hostility experienced in the United States, arbitration was not always the favoured dispute settlement mechanism in French legal history. For instance, in 1843, enthusiasm about arbitration suffered a set-back in the case of *Compagnie l'Alliance v. Prunier*,[1] where the dispute arose from a domestic fire insurance contract. An arbitration clause was found in the contract. Nevertheless, the judgment rendered by the *Cour de Cassation* proved to be a hindrance to the development of arbitration in France.

In the *Prunier* case, the language contained in Article 1006 of the French Code of Civil Procedure, 1806 was the main issue. Article 1006 provided that "an agreement of compromise that does not specify the matters in dispute and the names of the arbitrators is void." In accordance with this provision, the agreement between parties could only cover the disputes which had already arisen, rather than future disputes. The court decided to ignore the parties' desire to have their dispute resolved by means of arbitration. The court decided to apply Article 1006 to decide the validity of the arbitration clause. Based on Article 1006, the arbitration clause was unenforceable on

[1]Cass. civ. 10 July 1843, D. 1843.I.343, S. 1843.I 561. Discussed by von Mehren, "International Commercial Arbitration: The Contribution of the French Jurisprudence", 46 *Lou.L.R.* 1046 (1986).

the ground that the disputes did not exist when the clause was concluded. Furthermore, the *Cour de Cassation* expressed its concern that individuals "would be deprived of the guarantees that the courts afford"[2] if an arbitration clause which failed to specify the subject matter of a possible future dispute was enforced.

It was recognised that little room was left for arbitration under French law after the *Prunier* case. The aim of speed and efficiency of arbitration could be never guaranteed, since no binding arbitration clause could be made until disputes arose. Consequently, the development of both domestic and international commercial arbitration was seriously hindered.

Fortunately, this situation was changed after several decades. In the case of *Mardelé v. Muller*,[3] where the disputes arose from a c.i.f. contract for 100 tons of Chilean wheat between a French merchant and another French firm. The contract between the parties provided for arbitration in London which was to be subject to the rules of the London Corn Trade Association. According to Article 1006 of the Code of Civil Procedure, the Court of Appeal at Rennes determined that the arbitration clause was void on the ground that the parties could not stipulate a foreign law to govern a contract between French nationals.[4]

Nevertheless, the decision made by the *Cour d'Appel* was quashed by the *Chambre Civile* of the *Cour de Cassation*. The *Cour de Cassation* had a rather liberal approach which was different to the one applied in the *Prunier* case and held that the parties

---

[2]Cass. civ. 10 July 1843, D. 1843.I.344, S. 1843.I 568.
[3]Cass. civ. 19 Feb. 1930 S.1933.I.41. Quoted by von Mehren, "International Commercial Arbitration: The Contribution of the French Jurisprudence", 46 *Lou.L.R.* 1046 (1986).
[4]*Ibid.* The law of 30 December 1925, which had set aside the Prunier rule for commercial contracts - domestic as well as international - did not apply to the cause, the decision in first instance having been rendered prior to the law's effective date.

should have the right to choose a foreign law to govern the contract as long as the situation "involves the interest of international commerce." Moreover, it stated:

> "the nullity of the arbitration clause provided for by article 1006 of the Code of Civil Procedure not being of the *ordre public* in France, even if both parties are French they can validly derogate in a contract, whether concluded abroad or in France, from the provisions of this text and refer to a foreign law, such as English law, which considers such clause valid."[5]

The *Mardelé* case, in fact, released international commercial arbitration from the constraints imposed by the *Prunier* rule. As Mr. von Mehren's comments about *Mardelé* indicated:

> "The jurisprudence that culminated in Mardelé also implied ideas and techniques that were to continue to shape the French law's handling and understanding of international commercial arbitration. In particular, this case law strongly suggests that various aspects of the legal regime applicable to domestic arbitrations do not apply to arbitrations which involve the interests of international commerce. The jurisprudence further intimates that certain of the rules and principles governing the regime applicable to international commercial arbitrations need not flow from rules and principles found in a national law. Particular rules and principles of a non-national character can be developed to take into account the special qualities and requirements of international commercial arbitration as a dispute-resolution process."[6]

After World War II, with more business people conducting international trade activities, international commercial arbitration has frequently been chosen to settle disputes. They demanded that fewer restrictions be imposed upon international commercial arbitration. France was fully aware of this trend, and reacted in a positive way by amending its arbitration law. After studying the numerous academic materials and the decisions handed down by the French courts over the decades, the new French arbitration law was codified in Section IV of the *Nouveau Code de Procédure Civile* (Articles 1442-1507, added by the Decrees of 14 May 1980 and 12 May 1981, referred to as the "1981 Decree" hereafter). Several important principles that

---

[5] *Ibid.* at pp. 1047-48.
[6] *Ibid.*

"implicate international commercial interests" are embodied in the 1981 Decree, for instance: the distinction between domestic and international arbitration,[7] limited judicial interference and limited power to review international arbitration.

8.2 Article 1496 and 1497 of Section IV of the *Nouveau Code de Procédure Civile 1981*

Generally speaking, France has been an arbitration friendly country. French courts have adopted a liberal attitude towards international arbitral awards and arbitration held within its territory. This liberal attitude also covers the issue of choice of law arising from arbitration. The special status of international commercial arbitration has long been recognised in French arbitration law, especially after the enactment of Section IV of the 1981 Decree.

Due to the fact that some countries have dramatically reduced the restrictions on arbitration held in their territories as well as the increasing concerns about the balance between party autonomy in arbitral procedures and the need to ensure the integrity of arbitral awards rendered in France, France decided to amend its arbitration law. This was done especially because France was keen to foster a more friendly climate for international arbitration proceedings held in France and to encourage Paris as a situs for international commercial arbitration.

Compared to judges sitting in England and the United States, French judges have shown a particular reluctance to interfere with arbitration procedures. This profoundly

---

[7]Carbonneau, "The Elaboration of a French Court Doctrine on International Arbitration: A Study in Liberal Civilian Judicial Creativity", 55 *Tul.L.Rev.* 1 (1980).

liberal attitude has traditionally been held by the French courts. As a result, France has regarded herself as an ideal place for international commercial arbitration. Believing the traditional *lex fori* rules were not well-fitted to the particularities and needs of international trade[8] and being encouraged by the wide acceptance of party autonomy in the international commercial community, France recognised that international commercial arbitration should be subject to different rules (including choice of law rules) from those applicable to domestic arbitration held in France.

These changes can be seen in Articles 1496 and 1497 of the 1981 Decree, which applies to all arbitral awards which claim to be governed by French law regardless of the law or the agreement which they were connected with.[9] The theoretical propositions for these two provisions, and the whole framework of the French arbitration law, are the concept of the non-jurisdictional nature of international commercial arbitration and the principle of absolute party autonomy. In accordance with these propositions, the arbitrator's authority and responsibilities derive from the agreement between the parties, rather than from the State. As a result, unlike a national judge, arbitrators are not required to follow the *lex fori* in order to choose the procedural and substantive laws. In other words, in accordance with the 1981 Decree, international commercial arbitration can be detached from any legal order.

In accordance with the 1981 Decree, the parties' choice of a particular national law must be expressly stated and such a choice must conform to the requirements of international public policy of the law applied to the disputes. In the absence of parties' choice of law, Article 1496 gives arbitrators the authority to choose the governing law.

---

[8]David, *Arbitration in International Trade*, (1985), at p. 136.
[9]Robert, *The French Law of Arbitration*, (1983), at p. II-4-21.

Instead of following the traditional idea which required arbitrators to apply the conflict of laws rules of the country of the seat of arbitration, arbitrators are offered not only a total discretion which allows them to select whatever legal rules they deems appropriate, but also the authority to make a direct choice of the governing law.[10] Following this change, arbitrators are no longer obliged to state or follow the precise conflict of laws rules from which they ultimately determine the applicable law. Moreover, arbitrators are allowed to apply rules of law other than national law regimes if they deem it inappropriate to rule according to a national law. Conferring parties with the power and arbitrators the discretion to designate "rules of law", Article 1496 provides:

> "The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to rules he deems appropriate.
>
> In all cases he shall take into account trade usages."

This provision implies that arbitrators may be authorised to decide a dispute without reference to any particular national law. In other words, the "rules of law" chosen by the parties or arbitrators are not necessarily to be of a national origin. Compared to the traditional method, this provision provides greater flexibility and freedom. Consequently, with the flexibility offered by Article 1496, the formulation of "rules of law" also includes general principles of law and the new *lex mercatoria* (which is also known as the international law merchant). Furthermore, Article 1496(2), which requires arbitrators to take commercial usage into account, also provides arbitrators a chance to apply the rules borrowed from the new *lex mercatoria*, since some commercial usages may be embodied in the new *lex mercatoria.*[11] Therefore, in the

[10]Nevertheless, arbitrators do have the discretion to choose the substantive law through choice of laws rules if they feel bound to do so.

[11]Commercial usage was distinguished from the *lex mercatoria* in that the former consists of practices rather than rules restricted to a given branch of trade.

case of international commercial arbitration, the traditional choice of a national law as the proper law of the contract may be supplemented or even replaced by a reference to the general principles of the law or the new *lex mercatoria.* As Jean Robert commented: "the substance of Article 1496 requires the arbitral tribunal to take commercial usages into account regardless of the rules which the parties or the tribunal may have chosen. As a result, those commercial usages which make up the *lex mercatoria* are incorporated into and given a full status in the French legislation on international arbitration."[12]

In relation to the concept of amiable composition, Article 1497 confirms that the arbitrator's power to act as an *amiable compositeur* will be upheld by the French courts "if the parties' agreement conferred this authority upon him."[13] Apart from the cases where the strict rules of law are chosen, this provision allows the arbitrators to decide the case *ex aequo et bono* provided they are empowered to do so. Furthermore, in accordance with Article 1482, no appeal is allowed when the arbitrator is offered the authority to act as an *amiable compositeur* unless the parties expressly reserved the right to appeal in their Term of Reference.[14] Accordingly, amiable composition will not be a ground for either party to challenge the award before the French courts, since the arbitrators have decided the case in accordance with the power granted by the parties.

---

[12]Robert, *The French Law of Arbitration*, (1983), at p. II-4-23.

[13]Article 1497: "The arbitrator shall decide as "*amiable compositeur*" if the parties' agreement conferred this authority upon him."

[14]In domestic arbitrations expressly established under the powers of *amiable composition*, Article 42 of the 1981 Decree provides that, except in certain specific instances, the arbitral award is not subject to appeal unless the parties agree otherwise.

8.3 Acceptance of international commercial arbitral awards made on the basis of a-national principles by the French courts

As discussed in the last section, it is perfectly legitimate for a-national principles, either supplementing or replacing a particular national law, to be chosen as the proper law of an international contract in an international commercial arbitration. In this section, the examination will be focused on the French courts' attitude towards the application of a-national principles as the substantive law in the cases of international commercial arbitration. The judgments which have considered the application of the new *lex mercatoria* and amiable composition will be discussed separately in the following parts of this section.

8.3.1 The application of the new *lex mercatoria*

Before the seventeenth century, the *lex mercatoria* (mercantile law or *droit commercial*) was a body of law instituted and administered by merchants and concerning merchants only. Decades after disappearing from the international commercial community, the *lex mercatoria* was once again considered and widely discussed among jurists and scholars. Some scholars named it the new "*lex mercatoria*" in order to distinguish it from the old *lex mercatoria*.[15] Although the new *lex mercatoria* had already lost most of the original distinctive characteristics which had been applied in the 17th century, we still can find its influence over the development of international commercial arbitration in the French legal system.[16]

---

[15]See Chapter 5.

[16]See the decisions of the Cour d'Appeal de Versailles of May 19, 1988 and the Cour de Cassation, February 5 , 1991, DMF 1991, 292, which held that seven Institute clauses (including the Institute Cargo clauses, War clauses and War Cancellation clause) in a marine cargo insurance were: "a

In its present form the new *lex mercatoria* is made by the state, enforced by the courts within the hierarchy of the ordinary state courts (which hierarchy is headed by the *Cour de Cassation*), and, rather than a law for merchants, it is the body of law which covers all mercantile activities. A remarkable example of the lawmaker's acceptance of the new *lex mercatoria* as an autonomous source of law is embodied in the 1981 Decree. Article 1496(1) of the 1981 Decree provides that in international commercial arbitration: "the arbitrator shall settle the dispute in accordance with the rules of law which the parties have chosen, and in the absence of such a choice, in accordance with those rules of law which he considers to be appropriate" and that has been widely applied in various French cases.

Judgments in favour of the application of the new *lex mercatoria* can be seen in a number of French cases.[17] For instance, the application of the new *lex mercatoria* was discussed in a case where an agency contract was terminated by the principal. The arbitral tribunal, without being authorised to act as *amiable compositeurs*, applied the "general principles of obligation generally applicable in international trade"[18] to the case and granted partial remuneration for the service which had actually been performed. The principal attempted to challenge the award on the ground that the award was decided beyond the scope of the submission. Nevertheless, the challenge was rejected by the judges of the *Court d'Appel.* They held that, based on rules of law, the award was decided within the scope of submission, since the necessity of the

---

compilation of often ancient maritime usages, developed by the community of merchants without distinction of nationality, a true *lex mercatoria* to which marine transportation professionals ordinarily refer ...", (Unreported) Discussed in Note by Achard, R.

[17]The translation of some French cases discussed in this chapter was with the help of Ms. B. Cébrian, Lecturer of Department of Languages, Napier University and Dr. D. Leonardi.

[18]Decision of 12 June 1980; *J.D.I.* (1982), at p.231.

reference to international trade usage was acknowledged by the arbitrators in the reasoning of the award.

This judgment was also upheld by the Second Civil Chamber of the *Cour de Cassation*, which determined "that in referring to 'general principles of obligation generally applicable in international trade' the arbitrators only conformed to the duty imposed upon them by Article 8 of the Term of Reference to define the law applicable to the agreement".[19] As Professor Goldman commented, in France "the general principles applicable in international commerce are part of the law; to conclude that this decision signifies that *lex mercatoria* also is law, one need only recognise that *lex mercatoria* encompasses these general principles."[20]

The application of the new *lex mercatoria* was extensively discussed in the case of *Société Pabalk Ticaret Sirketi v. Soc. Anon. Norsolor.*[21] In this case, experiencing difficulties in deciding the proper law between French and Turkish law, the arbitral tribunal decided to apply the new *lex mercatoria* as the substantive law to resolve the dispute. By applying the new *lex mercatoria*, the French company was held in breach of contract against the Turkish company and was required to pay 800,000 francs in damages. This award was set aside by the Court of Appeal in Vienna when the judge indicated that the validity of the choice of the new *lex mercatoria* as the substantive law of the contract was doubtful.[22] Later on, a request to enforce the award and appeals against the judgment made by the Court of Appeal of Austria were filed in France and Austria separately. Ignoring the fact that the award was set aside by the

---

[19]Decision of 9 December 1981; *Rev.Arb.* (1982), at p. 183.
[20]Discussed in Goldman, *Forum Internationale* (Nov. 1983 No. 3) at p, 15.
[21]Decision of the Court of Appeal is discussed in the (1986) XI *Y.B.C.A.* p.484; decision of the Supreme Court of Austria is discussed in (1984) IX *Y.B.C.A.* 159.
[22](1986) XI *Y.B.C.A.* at p. 484.

Austrian Court of Appeal, the French court issued a writ to enforce the award while the appeal was still pending in the Supreme Court of Austria. The court stated that: "it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legal system, be it Turkish or French, and to apply the international *lex mercatoria.*"

On the other hand, in Austria, the judgment made by the Court of Appeal was reversed by the Supreme Court. The Supreme Court of Austria supported the arbitral tribunal's decision in choosing the new *lex mercatoria* as the proper law of the contract. Furthermore, the court upheld that the application of the new *lex mercatoria* was not contrary to any mandatory rules of the relevant national laws which may have applied.[23]

Support for the application of the new *lex mercatoria* can in particular be seen in cases involving ICC arbitration, since the language used in Article 13 of the ICC Arbitration which concerns the choice of law rules offers the arbitrators power to apply the new *lex mercatoria* to disputes. For instance, in one case a dispute arising from a delivery contract was referred to ICC. The parties had agreed to have their dispute arbitrated under the ICC Rules. Nevertheless, the parties failed to agree on the proper law of the contract, and did not expressly authorise the arbitrators to apply the new *lex mercatoria* to resolve the dispute. In a partial award rendered by the arbitrator, the dispute was resolved in accordance with the usage of international trade, that is, the new *lex mercatoria*.[24] The claimant sought to have the award set aside, but the *Cour d'Appel* of Paris rejected his petition. Furthermore, the enforcement of the award

[23](1984) IX *Y.B.C.A.* at p. 159.
[24]It was decided on 1 September 1988.

made under the new *lex mercatoria* was granted by the court, which believed that the arbitrator had properly fulfilled the terms of reference submitted to the ICC by applying the general principles of the conflict of laws to choose the new *lex mercatoria* as the proper law of the contract. The *Cour d'Appel* said:

> "Art 13 of the ICC Arbitration Rules, to which the Terms of Reference refer, provides that if the parties have not indicated the applicable law - as is the case here - the arbitrator applies the law designated by the rule of conflict which he deems appropriate, taking into account in all cases the provisions of the contract and the usages of trade...
>
> According to Art. 1496 New CCP, in the present case the arbitrator must decide the dispute according to the rules which he deems appropriate, taking into account in all cases the usages of trade."[25]

Furthermore, this judgment was affirmed by the *Cour de Cassation* in later appeal proceedings.[26]

The judges in the case of *Fougerolles v. Banque de Proche Orient* which also involved an ICC Arbitration, once again upheld the choice of the new *lex mercatoria*as the proper law of an international trade contract. The *Cour de Cassation* decided that it was simply the arbitrator's duty which was imposed upon him by the terms of reference to apply the "general principles of obligation generally applicable in international trade" to the dispute.[27] Therefore, as long as a minimum level of judicial control over the arbitral proceedings is guaranteed, the French courts are very willing

---

[25]*Compania Valenciana de Cementos Portland SA v. Primary Coal Inc.* Cour d'Appel, 13 July 1989; reprinted in (1991) XVI *Y.B.C.A.* pp. 142, at p. 143.

[26]Cour de Cassation decided it on 22 October 1991, and it was reprinted in (1993) XVI *Y.B.C.A.* 142, at p. 143.

[27]French courts have held, however, that the *lex mercatoria* is not merely equity, but is an authentic source of law. Accordingly, it has "juridicité" (legal character), so that arbitrators who render awards based on the *lex mercatoria* are not deciding as *amiables compositeurs*. See the *Fougerolles* case, Cour de Cassation, December 9 1981 in *J.D.I.* (1982), 931 (3e esp); discussed in Goldman, "The Applicable Law: General Principles of Law - The Lex Mercatoria" in Lew (ed.) *Contemporary Problems in International Arbitration*, (1986), 113 at pp. 119-120.

to "provide a favourable legal environment for international arbitration" by restricting re-examination of the substance of an award.[28] The *Cour d'Appel* said:

> "The agreement of the parties provides for the application of French law by the arbitrators. Since this is an international arbitration, Art. 1496 New CCP requires that even if the parties, as in the present case, have determined the applicable law, the arbitrators must take into account international trade usages. The norm is repeated in the ICC Rules, which apply to the present arbitration. Hence, by referring to the international trade usages in order to apply the notion of a group of companies to the case at issue, the arbitrators did not violate the Terms of Reference."[29]

8.3.2 The application of the notion of amiable composition

Two kinds of arbitration exist in the French legal system - namely - arbitration at law and arbitration according to equity, or amiable composition.[30] In the former, arbitrators are required to apply the law if parties do not expressly authorise them to act as *amiable compositeurs*. In the latter, with the parties' authorisation, arbitrators act as *amiable compositeurs* to decide the case, in accordance with equity or with their knowledge and sense of propriety. In this section, the discussion will be mainly focused on the second type of arbitration, that is, amiable composition and its development in France.

In fact, the concept of amiable composition is a creature of French law. Its origin can be dated back to the middle of the 13th century while the term "*amiabilis compositor*", which means conciliator, proposing a solution for the parties to ratify, made its first

---

[28] Pointon & Brown, "France: Resolving Disputes", *Euromoney* 13 (Supp. Sep. 1991).
[29] *K/S France SA and K/S Photo Industrie SA v. SA Societe Generale and Sogelease Corporation*, Cour d'Appel, Paris, 31 October 1989; reprinted in (1991) XVIII *Y.B.C.A.* 137, at p. 139.
[30] The same distinction is drawn in Switzerland and the Netherlands, Romania and Yugoslavia, Spanish and Portuguese speaking countries, the Lebanon, Iran, Indonesia , Malaysia. See David, *Arbitration in International Trade*, (1985), p. 330.

appearance in canon and civil law writings.[31] An *amiabilis compositor's* decision had not been enforceable until the line between the decisions of an *amiabilis compositor* (with power only to propose a solution) and an arbiter (with power to make a binding award) became blurred.[32] By the eighteenth century, the line between amiable composition and arbitration had become too blurred to be drawn. To reduce the confusion arising between these two terms, France decided to empower arbitrators to resolve the disputes in accordance with equity rather than only according to strict rules of law. This status of amiable composition was eventually confirmed in the *Code of Civil Procedure 1806* which upheld that it was a form of arbitration and in accordance with this power arbitrators were permitted to decide the case according to equity.

In modern French law, the concept of amiable composition is adopted in Article 1497 of the 1981 Decree. Article 1497 of the 1981 Decree states: "The arbitrator shall decide as *amiable compositeur* if the parties' agreement conferred this authority upon him." From this provision, amiable composition has a legal status in the French legal system. The concept of amiable composition was defined by a commentator as follows: "A dispute foreseen by the law itself, from strictly applying the rules of law, joined with the faculty of applying various criteria of interpretation and judgment, especially equity, commercial usages and the conscience of the arbitrator."[33] The aim of amiable composition was also discussed in a case where the *Tribunal de Grande Instance de Paris*, acting in a case of judicial arbitration, was conferred with the power of amiable composition. It said:

---

[31] Loquin, *Amiable Composition er Droit Comparé et International* (1980) 12-22; translation cited from Christie, "Amiable Composition in French and English Law", (1992) 58(4) *Journal of the Chartered Institution of Arbitration*, 259, at p. 263.

[32] David, *Arbitration in International Trade*, (1985), at p. 330. It could be overruled by the court if it was *iniqua* (contrary to equity) but not if it was simply *iniusta* (contrary to law).

[33] De Boisséson and De Juglart, *Le Droit Français de l'Arbitrage* (1983) at p. 295. Translation cited from Christie, "Amiable Composition in French and English Law", (1992) 58(4) *Journal of the Chartered Institution of Arbitration*, 259, at p. 259.

> "in conferring on the Tribunal the power of amiable composition, the parties have manifested their wish to see their dispute decided not by the application of the rules of law alone but also to obtain an equitable and acceptable solution by an adaptation if appropriate, of the law to the totality (ensemble) of the factual circumstances governing the relation of the parties."[34]

Nevertheless, not every French scholar agrees with the concept of amiable composition. For instance, some critics have argued that amiable composition is ambiguous and regard it as "a judicial puzzle, a sort of wager, the enfant terrible of the law of arbitration."[35] One issue surrounding the concept of amiable composition is whether an arbitrator should begin by considering what is equitable or by considering the law and then departing from it only when equity so requires.

Of these different opinions, the French law seems to be in favour of the latter view. Generally speaking, amiable composition does not only offer an arbitrator power to depart from the law but also imposes on him a duty to seek equity. Nevertheless, under French law[36], the arbitrators' authority to act as *amiable compositeurs* has to be conferred by the parties; as the 1981 Decree stipulates "The arbitrators decide according to the law, unless the arbitration agreement entitled them to decide as *amiable compositeurs*."[37] Moreover, for the parties' benefit, an arbitrator must indicate in his award the reasons which lead him to depart from the legal rules normally applicable. In short, "Amiable composition is not an appeal to pure equity, but an *amiable compositeur* should generally decide in accordance with the law,

---

[34]The decision of the Tribunal de Grande Instance de Paris, reported in (1987) *Rev Arb* 519 at 521. This definition is welcomed by Flécheux and René David *Arbitration in International Trade*, at p. 334.
[35]Kassis cited by Christie, "Amiable Composition in French and English Law", (1992) 58(4) *Journal of the Chartered Institution of Arbitration*, 259, at p. 264.
[36]Rubino-Sammartano, "*Amiable Compositeur* (Joint Mandate to Settle) and *Ex Bono Et Aequo* (Discretional Authority to Mitigate Strict Law) - Apparent Synonyms Revisited", (1992) 9(1) *J.I.A.* 5.
[37]Article 1474 of the 1981 Decree.

making moderate and circumspect use of their equitable powers and giving reasons for so doing."[38]

The application of the powers of amiable composition can be seen back as early as a case in 1956, long before the amendment of the 1981 Decree. In this case, taking equity into account, the arbitrator decided to compensate the winning party for the devaluation of money.[39] The same support has also been shown in the recent cases. For instance, in the case of *Société Intrafor Coloret Subtec Middle East Co. M.M. Gagnant Gialbert et al.*[40] the Paris *Cour d'Appel* had occasion to decide that commercial arbitrators were entitled to avoid the strict application not only of the provisions of law but also of a contractual clause, so long as they did not infringe rules of public policy.

The same attitude was also applied in *Najer v. Synthelabo*, where it was held that: "Granting to the arbitral tribunal the amiable composition authority, the parties have expressed their intention that the dispute be decided not just by applying statutory provisions but also to obtain an equitable solution by adjusting the law as needed to the factual circumstances existing in the relationships between the parties."[41] Also, in *Phoceenne de Depot v. Depots Patrollers de Fos*, the court stated that " ... in principle, the *amiable compositeur* may decide without having to strictly follow the law..."[42]

---

[38]David, *Arbitration in International Trade*, at pp. 335-336.

[39]*SEEE v. République Populaire Fédérale de Yougoslavie*, *J.D.I.* (1959) 1074, cited in Peter, *Arbitration and Renegotiation of International Investment Agreements* (1986) at p. 172; it would seem that by the present standards in France, this award would still stand because the arbitrators were, in fact, given the authority to rule as *amiable compositeurs*. Under Articles 12 and 58 of the *Nouveau Code de Procédure Civile*, even a judge can be given the power to decide as an *amiable compositeur*.

[40]*Rev.Arb.* (1985) no. 2 p.300.

[41]Court of Paris, 27 May 1987; *Rev.Arb.* 1987 519.

[42]Court of Appeal Paris, 28 April 1988; *Rev.Arb.* 1989, 280.

The issue of whether arbitrators are required to apply the strict rules of law under the New York Convention was also discussed before the French court. A dispute over whether the arbitrators' power to act as *amiable compositeurs* failed to comply with the terms of the Convention was referred to the *Cour d'Appel.* One party argued that the award should be void because no amiable composition clause was specified in Art. I (1), (3) and (4) of the New York Convention. The award was set aside by the *Cour d'Appel.* Nevertheless, the *Cour de Cassation* reversed the judgment made by the *Cour d'Appel* on two grounds. First, the language in the convention was clear and unambiguous. Secondly, the parties understood that the arbitrators chosen by them were to act as *amiable compositeurs.* Therefore, by acting as *amiable compositeurs*, the arbitrators were not required to follow the rules of law since the terms of reference did not specify that the arbitrators were obliged to apply the rules of law.[43]

In conclusion, from the cases discussed in this section, it is clear that the French courts have confirmed that it is legitimate for arbitrators to decide a case in accordance with the new *lex mercatoria*, or, with the parties' authorisation, to act as *amiable compositeurs* to solve disputes according to equity. In other words, a spirit of almost unlimited freedom permeating the provisions relating to the application of the new *lex mercatoria* and amiable composition to decide the case can be clearly observed in both the French 1981 Decree and the judgments handed down by the French courts.

---

[43]Pourvoi n. 89-20.629, 12 mai 1991, Arret n. 567, La Cour de Cassation, Deuxieme Chambre Civile. Also see Pourvoi n. 86-16.031 10 mai 1988 Arret n. 481 La Cour de Cassation, Premiere Chambre Civile.

Chapter Nine

Whether the United States courts accept the application of a-national principles in international commercial arbitral awards

9.1 Background: the American judge's power to choose the proper law of the contract

Compared to the English courts, the United States courts have a more friendly attitude towards the application of a-national principles as the proper law of contract in arbitration cases. In fact, this attitude can be observed from the choice of law rules followed by judges to decide the proper law of contract - at both state and federal levels, the issue of choice of the proper law is governed by the *Restatement (2d) of Conflict of Laws* (the "*Restatement*").

The *Restatement* was formulated by the American Law Institute in 1970 in order to resolve the different regulations existing in different states in the conflict of laws. Primarily, choice of the proper law of intrastate or interstate commercial contracts is discussed in Chapter Eight of the *Restatement*. In this Chapter, §186, §187 and §188 which set out the general principles which have to be followed by the American judges when determining the proper law of the contracts, will be examined.

First, §186 and §187 confirm the theory of party autonomy. Under these two sections, it is stipulated that parties have the right to choose any laws they wish to govern the contract between them. Secondly, in accordance with §187, subject to certain limited restrictions, such as mandatory rules and public policy, the law chosen by the parties to govern their contractual rights and duties will be recognised and

applied. In other words, as long as the choice of law made by the parties does not fall foul of the restrictions mentioned above, the judges must apply the law chosen by the parties according to §187.

It is suggested that an express reference to the law of a specific state in a contract is regarded as the best way of ensuring that the parties' wishes will be given effect.[1] As a result, the parties' reasonable expectations and desires of certainty and predictability of their rights and liabilities under the contract can also be provided for; parties are free to set out the terms of their contracts and have the power to decide the nature of their contractual obligations under the theory of freedom of contract (with certain limited restrictions). This is illustrated in the comment c on subsection (1) of §187, which states:

> "The parties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intentions of the parties. So much has never been doubted."[2]

In the absence of an express choice of law, in accordance with §188, the courts will have to exercise a gap-filling function to choose the proper law by applying the implied choice or the most significant relationship test to determine the applicable law to settle the dispute between the parties.[3] According to §188(2), in the absence of an effective choice of law by the parties, certain elements of the transaction can be an indication pointing to the proper law of the contract (such as the place of contracting, the place of negotiation of the contract, the place of performance, the location of the

---

[1]Comment a of § 187.
[2]Comment c on subsection (1) of § 187; *The Restatement (2d) of Conflict of Laws* (hereinafter the "*Restatement*"), (1970) p. 563.
[3]§ 188(1), *The Restatement*, (1970).

subject matter of the contract or even the domicile, residence, nationality, place of incorporation or place of business of the parties).[4]

The principle of party autonomy in the choice of the proper law is not only recognised by the *Restatement* but also by the Uniform Commercial Code ("U.C.C."). Although the U.C.C. is not a statute as such, it has a great deal of influence on the commercial cases submitted to the United States courts, since it was been enacted by all the states between 1957 and 1967. Nine Articles are embodied in the U.C.C.. Among these Articles, Article 1 contains the general provisions applicable to all transactions governed by the Code. Choice of the proper law of the contract is also dealt within this Article.

The U.C.C. §1-105(1) confirmed the idea that it is the parties' right to choose the proper law to govern the contract between them. In accordance with the first part of §1-105(1), the parties to an intrastate or interstate commercial contract[5] have the power to choose any law to govern their rights and duties. It states: "Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."[6] The second part of §1-105(1) deals with the situation where the parties fail to decide on the matter of choice of the proper law. Accordingly, failing such an agreement between the parties, this section will be applied to transactions bearing an appropriate relation to a particular state.

---

[4]§ 188(2)-(a), (b), (c), (d) and (e), *The Restatement*, (1970). Furthermore, in accordance with this section, the courts have to consider the relevant policies listed in § 6 while apply the most significant relationship test to decide the proper law of the contract.

[5]According to *Black Law Dictionary*, (5th ed.): "intrastate commerce" means "Commerce within a state, as opposed to commerce between states" (that is, intersate) at p. 738. "Intersate commerce" means "Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state; commerce between two states, or between places lying in different states" at p. 735.

[6]U.C.C. § 1-105(1).

To a certain extent, the choice of the proper law rules are not much different from those applied by the English courts. Nevertheless, as far as the issue of a-national principles is concerned, the American courts seem to hold a rather more liberal attitude than the English courts. Generally speaking, the English judges are required to apply national rules of laws to decide the cases submitted to them. In other words, the possibility of the application of a-national principles to litigation is denied by the English courts. In contrast, the American courts are more friendly towards this issue as can be seen in the U.C.C. According to the U.C.C. §1-103, the general principles of law, law merchant[7] and equity can supplement its provisions; therefore, a-national principles can be regarded as having a legal application to the commercial cases. This idea is not only stated in §1-103, which provides that "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions", but also observed from the relevant provisions underlying the purposes and policies of the U.C.C..[8]

In this chapter, attention will be focused on whether the United States courts accept the application of a-national principles in international commercial arbitral awards. As the application of a-national principles has already been expressly stipulated in the U.C.C. and the *Restatement*, only a limited number of disputes on this subject have been decided by the American courts. As a result of this, in the first part of this study, the

---

[7]The U.C.C. also provides the definition of "usage of trade" in § 1-205, which provides: "A Usage of Trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court."

[8]According to UCC § 1-102(1): "This Act shall be liberally construed and applied to promote its underlying purposes and policies". And, § 1-102(2) states that the underlying purposes and policies of the Act are: "(a) to simplify, clarify and modernise the law governing commercial transactions; (b) to permit the continued expansion of commercial practice through custom, usage and agreement of the parties and (c) to make uniform the law among the various jurisdictions."

Federal Arbitration Act 1924, which is regarded as an historical step in the development of arbitration in the United States, will be examined. Secondly, the influence of the Federal Arbitration Act ("FAA"), which not only reverses the centuries of judicial hostility but also introduces a friendly attitude towards arbitration, will be examined. Finally, the effect of this friendly attitude on the application of a-national principles in international commercial arbitration will be discussed.

9.2 An historical step - the enactment of the Arbitration Act 1924

As a result of the federal system and the diversities existing between different state laws, United States arbitration law was traditionally extremely complex. Before World War I, United States arbitration law was largely found in the common law - the English, federal, and state cases. With these diverse origins, uniformity of arbitration laws was difficult among the fifty states. On the one hand, it was due to the fact that, as far as the state level was concerned, the laws could be very different from each other. On the other hand, due to the fact that "the federal law was largely decided in accordance with the views commonly prevailing in the state courts and legislatures at the time"[9] the federal courts also failed to provide a body of federal arbitration law substantively distinct from prevailing state law. During this period, not only did the United States lack a uniform law governing arbitration matters, but a hostile attitude to international commercial arbitration commonly existed in both state and federal courts.

This situation lasted for quite a long period, and the reform of arbitration law was not invoked until the beginning of the twentieth century. Strictly speaking, the reform movement started in New York, which was then regarded as the greatest commercial and financial state of the United States. After a great deal of effort by the Chamber of

---

[9]MacNeil, *American Arbitration Law*, (1992), at pp. 21-22.

Commerce of the State of New York since 1768[10], the New York Arbitration Act 1920 was enacted. It was generally regarded as the first step in moving towards the reform and unification of the American arbitration system.

In fact, before the New York Arbitration Act 1920 passed, those in favour of the reform of federal arbitration law, mostly from the American Bar Association, had already started their national campaign for the enactment of a uniform federal arbitration law. Following a powerful lobby conducted by business groups and lawyers in 1922, a strong bias in favour of arbitration by Congressmen was shown by the proposed for a United States Arbitration Act. After a four-year campaign, the Senate Judiciary Committee held hearings on the bill in 1923, followed by joint congressional hearings in 1924; the House then unanimously passed the Act, which is generally referred to as the Federal Arbitration Act 1924 ("FAA").[11] The Act was re-enacted and codified in 1947 as Title 9 of the United States Code.[12]

The Federal Arbitration Act 1924, which contains three chapters, is designed to provide more support to arbitration. This Act confirms the idea that, for the parties to an international commercial contract, arbitration can be a better way to settle their disputes, compared to the expensive, slow and unreliable litigation process.[13] It not only allows the submission of future disputes to arbitration but also forbids unilateral repudiation by one party to an arbitration agreement. Consequently, the federal courts have to decline jurisdiction where a valid arbitration agreement exists between the parties. Also, under this Act it is established that the parties have the right to choose the law governing the contract between them.

---

[10]See Bloomfield, ed. "A Brief History of Commercial Arbitration in New York", in *Selected Articles on Commercial Arbitration in New York*, (1927) and MacNeil, *American Arbitration Law*, (1992), at p. 25.

[11]The State of New York, earlier than the Federal Government, enacted the New York Arbitration Act in 1920. And, the United States Federal Arbitration Act 1924 was modelled on the New York arbitration statute of 1920.

[12]Act of July 30, 1947, ch. 392, 61 Stat. 669.

[13]Born, *International Commercial Arbitration in the United States*, (1994), at p. 30.

Furthermore, with the efforts to help the United States companies expand their business into the global market,[14] and the motive to develop an effective system of dispute resolution for the international trade community, the United States government finally ratified the New York Convention in 1970. This intention was disclosed in the speech made by a Congressman, who said:

> "It is important to note that arbitration is generally a less costly method of resolving disputes than is full-scale litigation in the courts. To the extent that arbitration agreements avoid litigation in the courts, they produce savings not only with the parties to the agreement but also for the taxpayers - who must bear the burden for maintaining our court system."[15]

Later, following its ratification, the Congress enacted amendments to the FAA in order to include the New York Convention into federal arbitration law. A chapter (the Second Chapter) implementing the Convention was added to the Arbitration Act.[16]

Clearly, the enactment of the Federal Arbitration Act (FAA) was a turning point which reversed the centuries of judicial hostility to arbitration and was a device to allow parties to avoid the costliness and delays of litigation. The most important element is that the FAA placed arbitration agreements "upon the same footing as other contracts ..."[17] Nevertheless, the judicial hostility did not completely disappear until a few decades after the enactment of the FAA.

---

[14]S. Rep. no. 702, 91st Cong., 2d Sess. 1-2 (1970); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius*, 3 *Sw.U.L.Rev.* 1 (1971).

[15]116 Congress Rec. 22, 732-733 (daily ed. July 24, 1970) (Hamilton Fish); see also 731 (Andrew Jacobs); *Fuller Co. v. Compagnie des Bauxites Guiness*, 421 F. Supp. 938, 947 (W.D. Pa. 1976).

[16]Currently, the FAA consists of three chapters: (a) the domestic FAA 9 U.S.C. Articles 1-16, applicable to agreements and awards affecting either interstate or foreign commerce; (b) the New York Convention implementing legislation, 9 U.S.C. Articles 201- 210, applicable only to awards and agreements falling within the New York Convention; and (c) the Inter-American Arbitration Convention's implementing legislation, 9 U.S.C. Articles 301-307, applicable only to the awards falling under the Inter-American Convention.

[17]HR Rep. no. 96, 68th Cong. 1st Sess. 1, 2 (1924); cited in *Scherk v. Alberto-Culver Co.* 417 US 506 (1974), 510-511.

9.3 The hostile attitude before and after the enactment of the FAA

Compared to the historically liberal attitude in France towards international commercial arbitration, the liberal attitude held by the United States courts is rather recent. Historically, the American courts had a very hostile attitude towards arbitration, even as late as the early twentieth century. Before the FAA, the United States courts frequently denounced the validity of arbitration agreements on jurisdiction and public policy grounds. In fact, the ouster of jurisdiction argument was often applied by the courts. For instance, in 1898, the judges in the case of *Mitchell v. Dougherty*[18] refused the plaintiff's request to enforce the arbitration agreement between the parties since it was illegal for the parties to oust the court's jurisdiction by means of an arbitration agreement.

After the enactment of the FAA, this hostility still could be observed in a number of cases. It was especially so in the cases concerning choice of the proper law. The United States courts used to question the validity of the proper law chosen by the parties themselves, even though the parties had powers to choose the governing laws under the FAA. During this period, in fact, the American courts imposed a barrier which disallowed the contractual choice of law agreed between the parties to be applied to the dispute. For instance, in 1931, not long after the enactment of the Act, Judge Learned Hand vigorously objected to the application of the parties' choice of law:[19]

> "People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements - a statute like anything else - and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law

---

[18] 90 Fed. 639 (3d Cir. 1898); also see *Haskell v. McClintic-Marshall Co.*, 289 Fed. 405 (9th Cir. 1923); *Rae v. Luzerne County*, 58 F. 2d 829 (M.D. Pa. 1932); *California Prune & Apricot Crowers' Association v. Gatz American Co.*, 60 F. 2d. 788 (9th Cir. 1932).

[19] *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F. 2d. 115 (2d. Cir. 1931).

> says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."[20]

This unfriendly attitude could also be seen in the cases dealing with the issue of arbitrability.[21] For instance, in the *American Safety Equipment* case, which was later criticised in the *Mitsubishi* case, the Federal Court of Appeals held that the rights conferred by the antitrust laws were of a character inappropriate for enforcement by arbitration.[22]

Nevertheless, while international commercial arbitration developed at an enormous speed in the United States, the United States courts gradually began to reconsider their attitude towards arbitration. These changes included acceptance of the idea that it was the parties' right to choose arbitration as an alternative way to settle their disputes and that this choice must be honoured. Meanwhile, a more relaxed attitude towards the issue of choice of the proper law was also adopted. The changes made to make arbitration more desirable can not only be seen in several leading cases about international commercial arbitration but also in §186[23] - §188 of the *Restatement*[24] and the U.C.C. as discussed in the last section of this chapter.

9.4 A changing attitude towards international commercial arbitration

After realising that arbitration has gained a great amount of support and popularity in the international business community, the United States courts started to abandon their

---

[20]48 F. 2d. 115 (2d. Cir. 1931) at p. 117.
[21]See the cases of *Hal Roach Studios, Inc. v. Film Classics, Inc.* 156 F.2d. 596 (2d. Cir. 1946); *B.M. Heede, Inc. v. West India Machinery & Supply Co.* 272 F. Supp. 236, 240 (S.D.N.Y. 1967).
[22]*American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F 2d 821 (1968).
[23]§ 186 provided: "Issues in contract are determined by the law chosen by the parties in accordance with the rules of § 187 and otherwise by the law selected in accordance with the rule of § 188."
[24]*The Restatement*, (1970).

hostile attitude and began to decide cases in favour of arbitration. Generally speaking, at the present time, the United States courts are reluctant to set aside international arbitral awards. Furthermore, it is suggested that arbitrators should have no less freedom than the judges in the courts.[25]

This is illustrated in the case of *Transpacific Transport Corp. v. Sirena Shipping Co. S.A.*.[26] In this case, the buyer, Transpacific, brought proceedings to compel the seller, Sirena, to submit to arbitration the dispute which had arisen between them as to alleged breaches by the seller of a written agreement to sell a vessel. The buyer claimed breaches of warranty and misrepresentations as to the condition of the vessel. In the Supreme Court, Appellate Division, Breitel, J.P., held that where the arbitration clause of the agreement to sell the steamship provided that all disputes arising out of the agreement should be settled by arbitration the interpretation and application of the agreement were exclusively for the arbitrators and not for the courts once it was found that the dispute between the parties was a genuine one. Furthermore, Breitel J.P. remarked:

> "Nor are the courts endowed with a power of censorship of arbitration proceedings to make certain that the arbitrators will resolve the facts and the issues before them in the same manner that the courts believe they would have done. Nor are the arbitrators bound to exercise their powers in the mold of the forms of action or in the tradition of a chancellor."[27]

And,

> "Although judicial supervision of the deliberations and intermediate findings of arbitrators is not available, the provisions of a contract present to arbitrators an obligation only to interpret and apply the agreement and not to remake it. But the sanction for the performance of such obligation rests, once there is a genuine and arbitrable dispute, in the minds or breasts of the arbitrators ... Only if the award given a valid submission, exceeds their powers as arbitrators or goes beyond the matter submitted to them may there be corrective action in the courts."[28]

---

[25]*In re CompoDyne Corp., D.C.* Pa. 255 F. Supp. 1004; *Arlington Towers Land Corp. v. John McShain Inc. D.C.* 150 F. Supp. 904 (1957).
[26]193 N.Y.S. 2d 277 (Nov. 24, 1959) , 9 A.D. 2d 316, affirmed 170 N.E. 2d 391, 8 N.Y. 2d. 1048, 207 N.Y.S. 2d 70.
[27]*Ibid.* at p. 282.
[28]*Ibid.* at p. 283.

This friendly attitude was also shown in the *Moses H. Cone Memorial Hospital* and *Dean Writter Reynolds Inc.* cases[29] which contained an intensive discussion of a series of leading cases concerning the issue of arbitrability decided since the 1970s. For instance, in one of the leading cases, The *Bremen* case, where the dispute arose from negligent towage and breach of contract, a forum choice clause which provided that "any dispute arising must be treated before the London Court of Justice" was rejected by the Federal District Court and the Court of Appeals; as a result, Bremen's motion to stay the action was denied. Nevertheless, this judgment made by the Court of Appeals was vacated by the United States Supreme Court, which decided in favour of the forum choice clause agreed between the parties.[30] According to Chief Justice Berger, the forum choice clause should be specifically enforced, since Zapata failed to show that the enforcement of this forum choice clause would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching. Moreover, he discussed this issue from the economic and business points of view and said:

> "For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across land and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world market and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[31]

---

[29] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* 460 US 1 (1983), 24, 74 L.Ed 2d 765, 103 S.Ct. 927 and *Dean Writter Reynolds Inc. v. Byrd*, 470 US 213 (1985), 84 L.Ed 2d 158, 105 S.Ct. 1238.

[30] *M/S Bremen and Unterweser Reederei GMBH v. Zapata off-Shore Co.* 407 US 1 (1972), 32 L.Ed. 2d 513, 92 S.Ct. 1907.

[31] *Ibid.* at pp. 8-9.

The willingness to accept the forum choice clause expressed in the case of *M/S Bremen v. Zapata* brought a significant influence on the later cases involving international commercial arbitration matters. Its influence is shown in the case of *Fritz Scherk v. Alberto-Culver Co.*[32], where the disputes arose from a possible violation of the federal security laws. In this case, Albert - Culver (the buyer), a Delaware corporation with its principal place of business in Illinois, contracted to buy the stocks and trademarks of two European subsidiaries of Scherk, a company organised under the laws of Germany and Liechtenstein. A clause which provided that "any controversy or claim arising under the contract would be referred to arbitration before the International Chamber of Commerce in Paris, France ... the laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance" was contained in the arbitration agreement between the parties.

However, ignoring the arbitration agreement, Alberto-Culver brought a suit in the federal court claiming that Scherk (the seller) had violated §10(b) and Rule 10b-5 of the Securities Exchange Act (15 U.S.C.S. §78j) by fraudulently misrepresenting its trademark rights. Relying on the case of *Wilko v. Swan*[33] the District Court denied Scherk's motion to dismiss the action, but granted a preliminary order enjoining Scherk from proceeding with arbitration. This judgment was affirmed on the same ground by the United States Court of Appeals for the Seventh Circuit.

When this case reached the United States Supreme Court, the Court reversed the judgment made by the Court of Appeals and returned the case to the District Court. In the judgment, Stewart J. decided that the agreement between the parties to arbitrate any dispute arising out of their international commercial transaction must be respected and

---

[32]417 US 506 (1974), 41 L. Ed 2d 270, 94 S Ct. 2449.
[33]346 US 427 (1953), 98 L. Ed 168, 74 S.Ct. 182.

enforced by the federal courts in accordance with the provisions of the FAA. Believing predictability would be essential to international business transactions, he continued:

> "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a revision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

And,

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[34]

Agreeing with the speech made by Chief Justice Burger in *M/S Bremen v. Zapata,*[35] Justice Stewart expressed his view that to insist on the idea that American standards of fairness must govern the question of enforceability of an international arbitration agreement would demean standards of justice elsewhere in the world and unnecessarily exalt the primacy of United States law over the laws of other countries.[36] Finally, he decided that the underlying arbitration agreement must be enforced regardless of the allegation of the violation of the Securities Exchange Act of 1934.

A decade later, the United States Supreme Court, though with three judges dissenting, confirmed the strong presumption in favour of the enforcement of freely negotiated contractual choice-of-forum provisions stated in both the *Bremen* and *Scherk* cases.[37] In the *Mitsubishi Case,*[38] Soler, a car dealership in Puerto Rico, had distribution and sales agreements with a Swiss corporation and a Japanese corporation. An arbitration

---

[34]417 US 506 (1974), 516-517.
[35]407 US 1 (1972), 32 L.Ed. 2d 513, 92 S.Ct. 1907.
[36]417 US 519 (1974).
[37]*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985), 87 L.Ed. 2d 444, 105 S Ct. 3346.
[38]*Ibid.*

clause was found in the contract which contained a clause specifying arbitration in Japan under Swiss law. When a dispute arose under the contract between the parties at a later stage, the parties failed to resolve the dispute arising from a slackening in the sale of the automobiles themselves. Mitsubishi brought an action to compel Soler to settle the dispute by means of arbitration. Meanwhile, Soler filed a counter claim against Mitsubishi under the Sherman Act.

The Supreme Court decided that, with a valid arbitration clause embodied in an international commercial contract between the parties, claims arising under the Sherman Act were arbitrable pursuant to the Federal Arbitration Act. Relying on the case *Moses H. Cone Memorial Hospital v Mercury Construction Corp.*,[39] Justice Blackmun stated that "the liberal federal policy favouring arbitration agreements manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.""[40] Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration."[41]

Nevertheless, Justice Blackmun also stressed that this friendly policy did not mean that all controversies involving statutory rights were suitable for arbitration.[42] As far as the issue of arbitrability was concerned, he supported the "two step inquiry" test

---

[39]460 US 1 (1983), 24, 74 L. Ed 2d 765, 103 S Ct. 927; Also see *Dean Witter Reynolds Inc. v. Byrd* 470 US 213 (1985), 221, 84 L. Ed. 2d 158, 105 S Ct. 1238; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* 388 US 395 (1967), 400-404, 18 L. Ed. 2d 1270, 87 S.Ct. 1801; *Southland Corp. v. Keating* 465 US 1 (1984), 12, 79 L.Ed. 2d 1, 104 S.Ct. 852; *Steelworkers v. Warrior & Gulf Navigation Co.* 363 US 574 (1960), 582-583, 4 L.Ed 2d 1409, 80 S.Ct. 1347.

[40]460 US 1 (1983), 25, n. 32, 74 L Ed. 2d 765, 103 S.Ct. 927; also cited in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985), 87 L.Ed. 2d 444, 105 S Ct. 3346, at p. 625.

[41]*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985), 87 L.Ed. 2d 444, 105 S Ct. 3346, at p. 625. Also see *Moses H. Cones Memorial Hospital*, 460 US 1 (1983), 24-25, 74 L Ed. 2d 765, 103 S.Ct. 927.

[42]*Ibid.* 473 US 627 (1985).

applied by the Court of Appeal.[43] Though applying the same test, Justice Blackmun reached a different conclusion from the judgment made by the Court of Appeals. First of all, he was convinced that the American courts were "well past the time judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution".[44] Therefore: "that question of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favouring arbitration."[45]

Moreover, he also ruled out the argument about the incompetence of arbitrators dealing with antitrust matters. As he explained:

> "The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and the arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies. In sum, the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter."[46]

Accordingly, in this case, supporting the policy favouring arbitration and believing in arbitrators' ability, the Supreme Court ruled out the possibility that an arbitration agreement involving an antitrust dispute would invalidate the forum selection clause and the possibility that arbitrators might not be able to deal with complicated antitrust cases. Believing streamlined proceedings and expeditious results would best serve the

---

[43]The two step inquiry is, first, to determine whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding that it did to consider whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. See 473 US 628 (1985).

[44]*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985), 87 L.Ed. 2d 444, 105 S Ct. 3346, at pp. 627-628.

[45]*Moses H. Cones Memorial Hospital* case 460 US 1 (1983) at pp. 24-25 , 74 L.Ed. 2d 765, 103 S.Ct 927, cited in 473 US 626.

[46]*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985), 87 L.Ed. 2d 444, 105 S.Ct. 3346, at 473 US 634..

parties' needs, they concluded that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."[47]

Although arising from a domestic arbitration, a speech delivered by the Supreme Court in *Shearson/ American Express Inc. v. Eugene MaMahon,*[48] may provide another piece of evidence about the friendly attitude towards international commercial arbitration in the United States. In this case, a dispute arose from a contract between two customers and a brokerage firm which was registered with the Securities and Exchange Commission. Despite the existence of an arbitration clause, the customers filed a complaint with the United States District Court for the Southern District of New York, alleging that the brokerage firm and its representative violated the anti-fraud provisions of §10(b) of the Securities Exchange Act of 1934 and SEC (Securities and Exchange Commission) Rule 10b-5. O'Connor J., following the previous cases, and decided that the claims under the Securities Exchange Act were arbitrable under the provisions of the Arbitration Act. Since the Securities and Exchange Commission had been granted an expansive power to ensure the adequacy of arbitration procedures employed by the SROs (Self-Regulatory Organisations) since the 1975 amendments to §19 of the Exchange Act,[49] O'Connor J. stated:

> "the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is especially so in light of the intervening changes in the regulatory structure of the securities laws. Even if Wilko's assumptions regarding arbitration were valid at the time Wilko was decided, most certainly

---

[47] *Ibid.* at 473 US 629. However, Stevens J. Brennan J. and Marshall J. dissented on the grounds that an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify and Congress did not intend § 2 of the Federal Arbitration Act to apply to anti-trust claims, 473 US 641-666..

[48] 482 US 220 (1987), 96 L. Ed 2d 185, 107 S.Ct. 2332.

[49] *Ibid.* at p. 233.

they do not hold true today for arbitration procedures subject to the SEC's oversight authority."[50]

A more recent case, concerning punitive damages, handed down by the United States Supreme Court also applies this liberal attitude towards a domestic arbitration case. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[51] the arbitration panel, convened under the arbitration provision in the parties' standard-form contract and under the Federal Arbitration Act, awarded the petitioners punitive damages and other relief. The petitioners filed an action in the Federal District Court, alleging that their securities trading account had been mishandled by the respondent broker, Shearson, and tried to enforce this award. The District Court and the Court of Appeals rejected the punitive damages award on the ground that the contract's choice-of-law provision specified that "the law of the State of New York" should govern the dispute and New York law allows only the courts, not arbitrators, to award punitive damages.

When the case reached the Supreme Court, with one dissenting opinion,[52] the Court reversed the judgment made by the Court of Appeals on the ground that the Court of Appeals misinterpreted the parties' contract by concluding that the choice-of-law provision and the arbitration provision were in conflict. Relying on the case of *Allied Bruce Terminix Co. v. Dobson*,[53] the Supreme Court stated that "if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that the agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."[54] Consequently,

---

[50]*Ibid.* Also see the case of *Rodriguez de Quijas v. Shearson / American Express, Inc.* (490 US 477 (1989) concerning a dispute arose under section 12 (2) of the 1933 Securities Act. The court criticised the *Wilko* case as "falling far out of step with our current strong endorsement of the federal statutes favouring arbitration as a method of resolving disputes," at p. 483.

[51]*Antonio Mastrobuono and Diana G. Mastrobuono, Petitioners v. Shearson Lehman Hutton, Inc.*, (March 7, 1995) 63 LW 4195; The United States Law Week, Vol.63 no.33.

[52]Justice Thomas dissented; 63 LW 4199- 4201.

[53]115 S.Ct. 834 (1995).

[54]*Antonio Mastrobuono and Diana G. Mastrobuono, Petitioners v. Shearson Lehman Hutton, Inc.*, (March 7, 1995) 63 LW 4195; The United States Law Week, Vol.63 no.33., at p. 63 LW 4198, 4199, 115 S.Ct. 1212 (1995), at p. 1216.

it ruled that, though the agreement contained no express reference to punitive damages claims, an intention to include such claims was demonstrated by considering the impact of each of the two provisions separately and then inquiring into their meaning taken together. In other words, arbitrators may award punitive damages in arbitration proceedings conducted pursuant to an arbitration agreement that incorporates a self-regulatory organisation's rules permitting such awards, even though the agreement also contained choice-of-law provisions stating that the agreement was governed by laws of a state that empowered courts, not arbitrators, to award punitive damages.

Moreover, delivering the Court's opinion, Justice Stevens illustrated that due regard must be given to the federal policy favouring arbitration, and that ambiguities as to the scope of the arbitration clause itself should be resolved in favour of arbitration.[55] Furthermore, in accordance with the *Restatement (2d) of Contracts* §206 (1979), it is the common law rule of interpretation in contract that a court should construe ambiguous language against the interest of the party that drafted it;[56] consequently, a document should be read to give effect to all its provisions and to render them consistent with each other.[57] Finally, facing this ambiguous situation, he concluded:

> "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. ... The arbitral award should have been enforced as within the scope of the contract"[58]

---

[55] *Ibid.* at p. 4198; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* 489 US 468 (1989), at p. 476; see also *Moses H.. Cone Memorial Hospital* case 460 US 1 (1983), at pp. 24-25, 74 L.Ed. 2d 765, 103 S.Ct. 927.

[56] *Ibid.* at p. 4198; See also *United States v. Seckinger*, 397 US 203 (1970), 210; *United States Fire Ins. Co. v. Schnackenberg*, 88 Ill. 2d 1, 4, 429 N.E. 2d 1203 (1981), 1205; *Graff v. Billet*, 64 N.Y. 2d 899, 902, 477 N. E. 2d 212 (1984), 213-214.

[57] *Ibid. The Restatement* §203(a) and comment b.

[58] *Ibid.* at p. 4199.

A recent decision of the United States Court of Appeals for the Sixth Circuit reaffirmed the view of no interference with the resolution of the United States statutory claims in pending international arbitration proceedings.[59] In accordance with a licensing agreement between Hottinger, a German Company, and Fischer, an American company, Fischer would become the exclusive manufacturer and seller of Hottinger core machines in North America and Fischer would gradually cease manufacturing and marketing of its own core machines. Nevertheless, after several years, Fischer decided that it could not sell the Hottinger machines and sought to renegotiate the agreement so that it could continue to sell its own core machines. Hottinger refused Fischer's suggestion and referred the dispute to arbitration after Fischer terminated the agreement. Fischer argued in the arbitration that the portion of the Agreement requiring to terminate the production and marketing of its own core machines violated the United States antitrust laws; consequently, it filed suit in the United States District Court for the Eastern District of Michigan, to seek a declaration that the arbitration agreement was void. The District Court dismissed Fischer's lawsuit. Relying on a portion of footnote 19 in the *Mitsubishi* case,[60] Fischer appealed to the Sixth Circuit Federal Court. The Court of Appeals refused Fischer's petition and stated:

> "Footnote 19 and the cases cited therein stand for the proposition that if any part of a contract, including a choice-of-law provision, waives a party's right to collect damages for antitrust violations, the provision is void for public policy reasons. We do not have such a case here because it is not clear what law the Zurich tribunal will apply.
>
> Contrary to Fischer's contention, Mitsubishi stands for the proposition that arbitration should go forward even if there is a chance the United States antitrust statutory rights will not be fully recognized, because, should that occur, the aggrieved litigant may request a Federal Court, at the award-enforcement stage, to determine whether the arbitration award violates public

---

[59] *George Fisher Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH* 55 F. 3d. 1206 (6th Cir. 1995).

[60] Footnote 19 stated:
"In the even the choice-of-law clause [of an arbitration agreement] operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."

> policy. Here, because the Zurich tribunal has yet to decide what law it will apply, this case is not ripe for review."[61]

It is another example of the pro-arbitration tendency of the United States courts in their narrow construction of public policy arguments in international commercial arbitration.

9.5 Acceptance of international commercial arbitral awards made on the basis of a-national principles by the American courts

Compared to the debate among the English judges and scholars, the issue of the application of a-national principles, such as the general principles of law, the new *lex mercatoria* (trade usages)[62] and amiable composition, does not seem to have caused a serious problem in the American courts. Although some scholars[63] have suggested that the concept of a-national principles is foreign to the American courts, the application of a-national principles as the proper law of contract is recognised as legal by the courts.[64] Perhaps because the United States view of arbitration is closer to the French view; as a result, the United States courts tend to restrict the judicial review of arbitral awards in much the same way as in France.[65] According to the arbitration law, arbitrators are not required to apply strict rules of law to the disputes submitted to them. Furthermore, an arbitrator's error in findings of law or fact cannot constitute a

---

[61] *George Fisher Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH* 55 F. 3d. 1206 (6th Cir. 1995), at p. 1210.

[62] §1-205 (2) (3) of the UCC provide the definition of trade usage. According to, §1-205 (2) of the UCC, a usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such usages are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court. In terms of §1-205 (3) of the UCC a course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

[63] Such as Lando, "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 *I.C.L.Q.* 747.

[64] See *Ministry of Defense v. Gould Inc.*, 887 F.2d. 1357 (9th Cir. 1989).

[65] Weinberg, "Equity in International Arbitration: How Fair is "Fair"?", 12 *B.U.Int'l L.J.* 227 (1994).

ground to set aside the award, because "the interpretation of the law made by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[66]

Moreover, the awards rendered on the basis of a-national principles are not subject to judicial review by the American courts. The willingness to accept the application of a-national principles in international commercial arbitration cases is also expressly stated in the legal literature. For instance, §70 of the *Corpus Juris Secundum* provided: "Generally, arbitrators are not obliged to follow strict rules of law in the matter at hand and they are privileged to apply broad principles of justice." The similar idea can also be seen in §. 1-103 of the U.C.C..[67] It provides:

> "Unless displaced by the particular provisions of this Act, *the principles of law and equity, including law merchant* and the law relative to capacity to contract, principle and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."[68] *(Italics added)*

This positive attitude dates back as early as 1842. In the case of *Swift v. Tyson*,[69] where the dispute arose from an acceptance of a bill received as the payment of a pre-existing debt, while one party claimed the acceptance was *bona fide*, relying on the case of *Brush v. Seribner*,[70] Justice Story made a historical statement as following:

---

[66]*San Martine Compania de Navegacion SA v. Saguenay Terminals Ltd.* 293 F. 2d 796 (1961); *Wilko v. Swam* 346 US 427 (1953), 436 and *Bernhardt v. Polygraphic Co.* 350 US 198 203.

[67]See *In re Barton, Bkrtcy Wash.* 37 B.R. 545 (1984); B*igger v. Fremont Nat. Bank & Trust Co.* 340 N.W. 2d 142 (1983), 215 Neb. 580; *S.S Kresge Co. v. Port of Longview* 572 P. 2d 1336 (1977), 18 Wash App. 805; *Metty Shurfine Cent. Corp., Mo.* App. 736 S.W. 2d. 527 (1987); *R.C. Durr Co., Inc. v. Bennett Industries, Inc.* Ky. App. 590 S.W. 2d 338 (1979).

[68]In fact, the authors of the Code proclaimed that it is the modern *lex mercatoria* mentioned in the text. See Juerger, "The *Lex Mercatoria* and the Conflict of Laws", in *Lex Mercatoria and Arbitration*, (Carbonneau ed. 1990) (citing U.C.C. §1-105, cmt 3 (1992). It must be noted, however, that opponents of the U.C.C. point to this very fact as one of the U.C.C.'s greatest weaknesses. What certainty can there be, they argue, in a system which promotes such gapfilling, which gives such discretion to those who interpret it? by Professor Maureen O'Rourke, *Lecture to a Boston University School of Law Class on the Uniform Commercial Code* (Jan. 10, 1994).

[69]41 US (16 Pet) 1 (1842).

[70]11 Conn. R. 388 which held upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a bona fide holder against all the antecedent parties to a negotiable note.

> "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, (2 Burr. R. 883, 887) to be in a great measure, not the law of a single country only, but of the commercial world."[71]

Following this decision and taking the relevant rules in the U.C.C. and the *Corpus Juris Secundum* into consideration, this favourable attitude has been applied in several recent cases which confirm the idea that "arbitrators are not bound by rules of law and their decisions are essentially final."[72] Furthermore, some judges support the idea that the U.C.C. "shall be supplemented by existing principles of law and equity,"[73] provided the general principles of law are not displaced or conflict with certain particular provisions in this Code.[74] Furthermore, in the case of *Starcraft Co. A. Div. of Bangor Operations Inc. v. C.J. Heck Co. of Texas, Inc.*,[75] by taking §1-103 of the U.C.C. into consideration, the court decided:

> "Although Texas statute establishing liability of bank for failure to return demand item prior to midnight deadline does not expressly grant a right of subrogation in the drawee bank to assert maker's equities and defences to extinguish payee's claims, such a right is available through statute providing that principles of law and equity supply the provisions of the Uniform Commercial Code."

This decision is also supported by the judges in the case of *Ministry of Defense v. Gould Inc.*,[76] which concerned the application of international law. In this case, Gould asserted that the defensive provisions listed in the New York Convention contained an implicit requirement that the convention applied only to arbitral awards made in accordance with the national arbitration law of a Party State. This claim was made on the basis of Article V(1)(e), which provides that enforcement should not be granted if it can show that "the award has not yet become binding on the parties, or

---

[71] 41 US (16 Pet) 1, 19 (1842).
[72] *In re Aimcee Wholesale Corp. & Tomar Prods.* 21 N.Y. 2d. 621, 626-627, 237 N.E. 2d. 223, 225, 289 N.Y.S. 2d. 968, 971 (1968).
[73] *Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.* 177 N.W. 2d 25 185 Neb. 515 (1970); *Gold Kist, Inc. v. Pillow*, Tenn. App. 582 S.W. 2d 77 (1979).
[74] *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, S.D. 349 N.W. 2d 407 (1984).
[75] 784 F.2d. 982 (1984), rehearing denied 753 F.2d. 1075, rehearing denied 755 F.2d. 173.
[76] 887 F.2d. 1357 (9th Cir. 1989).

has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Gould argued that because the Tribunal's award in favour of Iran was a creature of international law, and not national law, it did not "fall under" the Convention pursuant to U.S.C. §203; consequently, the recognition of awards which were not made under a foreign municipal law should not be granted. Nevertheless, Judge O'Scannlain disagreed with Gould's argument and decided:

> "Section 203 (9 U.S.C.) does not contain a separate jurisdictional requirement that the award be rendered subject to a "national law." Language pertaining to the "choice of law" issue is not mentioned, or even alluded to, in Article I, which lays out the convention scope of applicability. In addition, although it is a close question, the fairest reading of Convention itself appears to be that it applies to the enforcement of non-national awards. Indeed, a Dutch court has so held."[77]

Furthermore, in relation of the language laid out in Article V (1)(d), he said:

> "Although this language seems to be at loggerheads with that of Article V (1)(e) concerning "the country ... under the law of which, [the] award was made," it is possible to reconcile the two provisions in accordance with an interpretation that holds that the Convention applies to "non-national law" awards. that is, if the parties choose not to have their arbitration governed by a "national law," then the losing party simply cannot avail itself of certain of the defenses in subparagraphs (a) and (e)."[78]

Finally, the court concluded that an award did not require to be made under a national law for a court to entertain jurisdiction over its enforcement pursuant to the Convention.

---

[77] *Ministry of Defense v. Gould, Inc.* 887 F.2d. 1357 (9th Cir. 1989) at p. 1365. Also see *Societe Europeenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia, HR (Hoge Raad der Nederlanden)* NJ 74, 361 (1974). In this case, the Hoge Raad , the highest court of the Netherlands, reversed the Court of the Hague, which had ruled that the Dutch trial court erred in recognising an arbitral award that was not issued according to the law of Switzerland. The Hoge Raad held that the strictures of Article V did not come into effect unless and until "the party against whom the award is invoked furnishes proof of the existence of one of the impediments specified under (a) to (e) in Article V. The relationship between the award and the law of a particular country need only be examined in the framework of an investigation to be carried following a plea that the impediments mentioned in Article V (1) exist ... in respect of a particular country."

[78] *Ministry of Defense v. Gould, Inc.* 887 F.2d. 1357 (9th Cir. 1989) at p. 1365.

In fact, arbitrators are required to decide the proper law by following the choice of law rules, either applying the parties' expressed choice, or in the absence of the parties' choice, deciding it according to the relevant circumstances. Yet, no matter which method is applied to decide the substantive law, they are not required to apply strict rules of law to the dispute. Arbitrators are allowed to adopt a solution which they regard as the best for the case, such as applying the broad principles of justice and good conscience and deciding the case according to their concept or notion of justice, "even though from a strictly legal point of view it may not be absolutely correct."[79] A similar comment is also mentioned by Mr. Born, who said: "Historically, arbitration in the United States bore many resemblance to arbitration *ex aequo et bono* or *amiable compositeur*. Arbitrators were not required to give reasoned awards, not to apply statutory protections and their decisions were not reviewable for errors of law (or fact)."[80]

Although the American statutory provisions or case law never expressly recognise that arbitrators are allowed to act as *amiable compositeurs*, some scholars suggest that this concept has been used in practice perhaps more frequently by the United States arbitrators than by French arbitrators.[81] They believe that it may be because equity is regarded as an undivided part of "law", therefore, they "do not think of themselves as doing anything special in so acting"[82] as *amiable compositeurs*. In other words, when acting as *amiable compositeurs*, arbitrators are expected to make equitable

---

[79]David, *Arbitration in International Trade*, (1985), at p. 335.

[80]Born, *International Commercial Arbitration in the United States*, (1994), at p. 136. Also see Domke on *Commercial Arbitration*, (1993), §§ 1.01 - 1.03. Also see *In re Aimcee Wholesale Corp. & Tomar Prods.* 21 N.Y. 2d. 621, 626-627, 237 N.E. 2d. 223, 225, 289 N.Y.S. 2d. 968, 971 (1968), where the court said: "Arbitrators are not bound by rules of law and their decisions are essentially final. Certainly the awards may not be set aside for misapplication of the law ... More important, arbitrators are not obliged to give reasons for their rulings or awards. Thus our courts may be called upon to enforce arbitration awards which are directly at variance with statutory law and judicial decision interpreting that law."

[81]Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, (1991), at p. 137; Stein & Wotman "International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules", 38 *Bus.Law.* 1714 (1983).

[82]Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, (1991), at p. 137.

considerations part of the law to reach their decision and to place greater emphasis in their decision-making on their own notions of fairness and justice.[83]

This conclusion is not only evidenced by a survey conducted by Mr. Mentschikoll but also by some jurists and judges. According to Mentschikoll, although 90% of the arbitrators involved in the survey declared that as a matter of principle they would apply the law, they would not regard themselves as bound to do so if they believed that departure from such principle would give a better solution.[84] On the other hand, this idea is also supported by some jurists and judges who are in favour of the concept of amiable composition.[85] They contended that, by waving the strict application of non-mandatory rules of procedural or substantive law, arbitrators, in the United States, can be empowered by the parties to act as *amiable compositeurs* who are not bound by rules of law and their decisions are essentially final.

This concept was also accepted by the federal court in the case of *International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Commercial.*[86] In this case, an international business subsidiary of an American telecommunications company (ISEC) filed a petition seeking to vacate a foreign arbitration award, whereas the Argentinean company involved in the arbitration proceedings filed a petition to enforce the award. The issue argued before the court was whether the arbitral panel decided matters beyond the scope of the submission to it, and as a result contrary to the public policy of the United States under Article V (2)(b) of the 1958 New York Convention, and whether the arbitrators "exceeded their authority by awarding damages based on equitable norms, rather than on law".

---

[83]As the definitions given by *Black's Law Dictionary* show: "arbitrators deciding as *amiables compositeurs* may rely on "justice and fairness," they may decide "according to what is just and good, according to equity and conscience." When deciding *ex aequo et bono*, they may "abate something of the strictness of the law in favour of natural equity."

[84]Mentschikoff, Sona, "Commercial Arbitration" 61 *Colum.L.R.* 846 (1961), at p. 860.

[85]Crane, "Arbitral Freedom from Substantive Law", 14 *Arb.J.* 163 (1959). Sanders, *International Arbitration Liber Amicorum for Martin Domke*, (1967),.at pp. 301-312.

[86]745 F. Supp. 172 (S.D.N.Y. 1990).

In the award, the arbitral panel decided: "All in all, the combined guidance of the relevant legal principles, applied in the context of the equitable nature of the norms which govern our task, lead us to conclude that Bridas is entitled to the "restitution" of its May 1979 investment of $ 7.5 million...."[87] The arbitral panel carried on awarding the Argentinean company an interest rate of 12% per annum. The ISEC disputed this factual finding because the arbitrators acted as *amiable compositeurs*.

Judge Conboy said that the 1958 New York Convention would not allow the court to refuse enforcement of the arbitral award even if the arbitrators were acting as *amiable compositeurs* without authority and in "manifest disregard of the law", since the Convention said nothing about this issue.[88] Furthermore, the court believed that the purpose of the New York Convention to assure consistency in the enforcement of foreign arbitral awards would be frustrated "if judges sitting in each of the many jurisdictions where enforcement may be obtained, were authorized by the Convention to undertake a *de novo* inquiry into whether the law the arbitrators said they were using was or was not properly applied by them."[89]

A century after the case of *Swift v. Tyson*,[90] with the efforts made by the United States Supreme Court in a series of leading cases as discussed in this chapter, the idea that "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states"[91] was finally confirmed in the American judicial system. Generally speaking, though famous for the issue of arbitrability, the *Mitsubishi* case was in addition regarded as a demonstration of the arbitrator's function in applying public law. In other words, arbitrators are allowed to render private international justice on

---

[87] *Ibid.* at p. 181.
[88] *Ibid.*
[89] *Ibid.* at p. 182.
[90] 41 US (16 Pet) 1, (1842).
[91] 473 US 614 (1985), at 636.

certain subjects, even though it is against American domestic public policy. The contribution made by these cases is a kind of recognition of the justice provided by a transnational private judicial system. From *Swift v. Tyson*[92] to the *International Standard Electric Corp.* case,[93] the issues surrounding the arbitrator's freedom to decide cases on the basis of a-national principles are no longer a debatable topic in the United States courts.

[92]41 US (16 Pet) 1, (1842).
[93]745 F. Supp. 172 (S.D.N.Y. 1990).

Chapter Ten

Whether the Hong Kong, Chinese and Taiwanese courts accept the application of a-national principles in international commercial arbitral awards

The rapid pace of growth in the economies of South East Asia has attracted the attention of international economic observers. It is believed that the economy in this area will keep growing for the next century. Many international business people have built up or are going to build up their businesses in this region. They especially focus on the economic development in Hong Kong, China and Taiwan. However, they are also conscious of the growing difficulty in penetrating the emerging Asian market. From the viewpoint of international commercial operators, in the foreseeable future international commercial arbitration will be used as an alternative dispute settlement mechanism to avoid any potential complicated judicial procedures in these countries. It is therefore desirable to evaluate how the national courts of Hong Kong, China and Taiwan treat international arbitral awards made on the basis of a-national principles.

Although there is a very close tie among Hong Kong, China and Taiwan, both historically and geographically, nevertheless they do not belong to the same family of legal systems. Being a colony of the United Kingdom over a century, the legal system of Hong Kong is under a great deal of influence from the common law system, which is totally different from the civil law systems adopted in China and Taiwan. Despite the political disputes over sovereignty, Taiwan neither shares the same law applied in China nor belongs to the Chinese judicial system. In fact, Taiwan has its own independent judicial system. Under these circumstances, a-national principles awards in these three jurisdictions have to be treated individually.

The purpose of this chapter is to examine whether the concept of a-national principles is accepted in the newly developing economic states, or it is simply an idea prevailing in Western Europe and in the United States. This chapter is composed of three sections. The first section, under two individual headings, will contain a background of the Arbitration Act 1990 and an investigation into the attitude of the Hong Kong courts on this subject. It will be followed, in the second section, by a discussion of the development of arbitration law in China and the status of awards made under a-national principles before the Chinese courts. Finally, in the third section, the attitude of the Taiwanese courts towards the application of a-national principles in arbitral awards will be examined.

10.1 Hong Kong

10.1.1 Background study

Having been a colony of the United Kingdom for over a century, Hong Kong's legal system has been influenced by Britain. In 1841, when the Chin Dynasty lost a war to the United Kingdom, the British flag was raised in the island. Since then, Hong Kong has imported the English common law system along with its existing statutes by local Ordinances and the Chinese customary law into its legal system.[1] Consequently, Hong Kong legislation is usually modelled on the English legal system. This is also the case for Hong Kong's arbitration laws. The development of international commercial arbitration law in Hong Kong is largely influenced by English law.

As far as international commercial arbitration laws are concerned, statutes modelled on English laws, international conventions acceded by the British Government on behalf of Hong Kong, and precedents established by the English courts are the main sources

[1] Simmonds and Hill, *Commercial Arbitration Law in Asia and Pacific*, (1987), at p. 21.

of the law relating to international commercial arbitration in Hong Kong. The relevant statutes can be observed in the Arbitration Ordinance, Chapter 341 of the Laws of Hong Kong which are modelled on the English Arbitration Acts 1850, 1950, 1975 and 1979.[2] As for international conventions, by the reason of the United Kingdom's accession on behalf of Hong Kong, Hong Kong is bound by the Geneva Protocol on Arbitration Clauses 1923,[3] the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927,[4] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[5] Furthermore, the Hong Kong courts decide cases in accordance with precedents of the English courts.

Due to the influence of the English legal system, compared to other Eastern Asian countries, Hong Kong's arbitration law is regarded as more sophisticated by Western scholars. They also believe that fewer barriers exist in the arbitration laws adopted by Hong Kong and Western countries. Because of this advantage, Hong Kong has always tried to promote itself as an excellent forum for international commercial arbitrations held in Asia. With this intention, Hong Kong decided to incorporate the UNCITRAL Model Law into its existing arbitration framework. As explained by Mr. MacNaughton, several other reasons also contribute to Hong Kong's special status in international arbitration:

> "First, there is a supportive statutory scheme. In fact, effective April 6, 1990, Hong Kong adopted the UNCITRAL Model Law for all international commercial arbitrations that take place in the territory. Second, there exists in Hong Kong a strong network of experienced lawyers, judges and expert witnesses. The judiciary in particular is sophisticated in arbitration matters and is sensitive to what it takes to promote Hong Kong as a regional arbitration centre. A third factor is the widespread use of English language. Fourth, there are relatively few restraints on the direct participation of foreign lawyers in arbitration proceedings. Fifth is the applicability of English common law, most

[2]The amendments made to the 1979 Act did not come into force until 1982.
[3]Arbitration Ordinance Schedule I.
[4]*Ibid.* Schedule II.
[5]*Ibid.* Schedule III.

> importantly with regard to the law of contracts. And sixth, Hong Kong offers convenient facilities for arbitration."[6]

In fact, Hong Kong went beyond the regime set by the United Kingdom and adopted the UNCITRAL Model Law in its statutes concerning international commercial arbitration. Eight years after the 1982 amendment, Hong Kong decided to substitute its existing international commercial arbitration framework with the whole of the UNCITRAL Model Law. In November 1989, in order to bring the Model law into effect, further amendments to the Arbitration Ordinance were made. The Arbitration Ordinance formally adopted the Model to regulate international arbitrations held in the territory of Hong Kong.[7] The new regime came into force on April 6, 1990.[8] Following this change, Hong Kong has, six years on, become a very popular place for arbitration in the Pacific Rim.

10.1.2 Acceptance of international commercial arbitral awards made on the basis of a-national principles by the Hong Kong courts

Being the most sophisticated and popular forum for international commercial arbitration held in Asia, the concept of a-national principles has frequently been applied by international commercial arbitrators in Hong Kong. In order to decide whether the application of the general principles of law, the new *lex mercatoria* or amiable composition as the substantive law of the contract in international arbitration is allowed before the Hong Kong courts, three issues have to be considered. First, what attitude do the Hong Kong courts hold towards the principle of party autonomy in choice of the substantive law? Secondly, what attitude do the Hong Kong courts hold

---

[6]MacNaughton, "Arbitration and Dispute Settlement Procedures in Hong Kong", in *Private Investor Abroad*, (1990), Chapter 10, at p. 10-5.

[7]Arbitration (Amendment) (No. 2) Ordinance 1989.

[8]Since then, a dual statutory system has been adopted for arbitrations held in Hong Kong. On the one hand, domestic arbitration is governed by the previous law modelled on the English Arbitration Acts 1950-1979. On the other hand, the UNCITRAL Model Law applies to international arbitration held in Hong Kong.

towards the application of the new *lex mercatoria* as the substantive law in international commercial arbitration? Thirdly, what attitude do the Hong Kong courts hold towards awards decided on the basis of equity?

Firstly, as far as the principle of party autonomy in choice of law is concerned, the Hong Kong courts follow the decisions handed down by English courts before and after the adoption of the Model Law. According to the English precedents, the parties' freedom to choose both procedural and substantive laws is subject to the public policy and mandatory rules of the country where the arbitration is held. As far as the municipal procedural law is concerned, the parties can choose either Hong Kong or a foreign law to govern the procedural matters. In the absence of such agreement, the Hong Kong Ordinance will govern the procedural matters of the arbitration when the parties agree to arbitrate in Hong Kong.

Following the principle set by English courts that "a contract is governed by the law chosen by the parties",[9] the parties' freedom to choose the substantive law applicable to the merits of the disputes is also recognised before the Hong Kong courts, "provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[10] If they failed to do so, the arbitrators must determine which law governs the underlying contract. Before the adoption of the UNCITRAL Model law, the substantive law to be applied to the merits of the dispute would be decided on the basis of the "implied choice test" or the system of law which had the closest connection to the contract, the so-called the "most real and closest relationship" test.[11]

---

[9] *Dicey and Morris on The Conflict of Laws*, (12th ed. 1993), p. 1211.
[10] *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277, 299; *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] AC 583, 603. Simminds and Hill, *Commercial Arbitration Law in Asia and Pacific*, (1987), at p. 24.
[11] *Bonython v. Commonwealth of Australia* [1951] AC 201, 209.

Nevertheless, after the UNCITRAL Model Law came into force, arbitrators sitting in Hong Kong are no longer required to apply the choice of law rules of the *lex fori* in order to decide the substantive law of the contract. According to Article 28(2), in the absence of the parties' express choice of the substantive law, arbitrators can apply any system of the conflict of laws which they consider appropriate to determine the law governing the substantive issues of the cases.

While a choice of the "general principles of international law" in conjunction with the application of a municipal law is regarded as a valid choice of law,[12] the application of the new *lex mercatoria* as the substantive law in international commercial arbitration, and the attitude held by the Hong Kong courts, have to be discussed from the point of view of both the decisions handed down by English courts and the New Arbitration Ordinance which brought the UNCITRAL Model Law into effect in Hong Kong. Examining the cases decided by the English courts, a positive answer is given to the issue whether the application of the new *lex mercatoria* is allowed before the English courts.

The most famous case is *Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)*[13], where the arbitrators applied the so called "internationally accepted principles of law" to decide the dispute arising from the contract. The Court was convinced that the parties did have the intention to create legally enforceable rights and liabilities.[14] It stated that the decision about the choice of law was left with the arbitrators, and that their decision to choose "internationally accepted principles of law" to govern contractual relations between the parties did not lead to the conclusion that the parties did not

[12]See *Thai-Europe Ltd. v. Pakistan Government* [1975] 1 WLR 1485; *Amin Rasheed Corp. v. Kuwait Insurance Co.* [1984] AC 50; and *Dallal v. Bank Mellat* [1986] QB 441; [1986] 2 WLR 745. A detailed discussion on this subject can be seen in Chapter Seven.
[13]*Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)* [1987] 3 WLR 1023.
[14]*Ibid.* at p. 1035.

intend to create legally enforceable rights and obligations, nor was it void for uncertainty or contrary to public policy. This decision was followed by the case of *Channel Tunnel Group v. Balfour Beatty Ltd.*,[15] where the House of Lords simply left the choice of law clause alone without further discussion.

From the viewpoint of the New Arbitration Ordinance which brought the UNCITRAL Model Law into effect in Hong Kong, not surprisingly the same conclusion can also be drawn from a reading of Article 28 of the Model Law:

> "1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute...
> 2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers appropriate.
> ...
> 4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Therefore, it can be concluded that the application of the new *lex mercatoria* as the substantive law of the contract in international arbitration is recognised before the Hong Kong courts, both before and after the adoption of the UNCITRAL Model Law in 1990.

Nevertheless, the application of the notion of amiable composition in international commercial arbitration in Hong Kong used to be more complicated than the issue of the new *lex mercatoria*. From the decisions handed down by the English courts, both negative[16] and positive[17] attitudes have been observed as outlined in Chapter Seven.

---

[15][1993] AC 334; [1993] 2 WLR 262.

[16]*Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen* [1962] 2 Ll L R 257, 264; *David Taylor & Son Ltd. v. Barneet Trading Co.* [1953] 1 WLR 562, at pp. 568 and 570; *Overseas Union Insurance Ltd. v. A.A. Mutual Insurance Co. Ltd.* [1988] 2 Ll L R 63, 72.

[17]*Rolland v. Cassidy* (1888) 13 AC 770., at pp. 772-773, 774; *Jager v. Tolme and Runge* [1916] 1 KB 939, 953; *Board of Trade v. Cayzer Irvine & Co.* [1927] AC 610, at pp. 628-629; *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Ll L R 357, at pp. 361-362; *Home Insurance Co. and St. Paul Fire and Marine Insurance Co. v. Administratia Asigurarilor de Stat* (1983) 2 Ll L R 674, 677.

For instance, in the *Eagle Star Insurance*[18] and *Home Insurance Co.*[19] cases, both Lord Denning and Park J. regarded a clause conferring upon arbitrators the powers not to be bound by strict legal principles as entirely reasonable, whereas Evan J. in the case of *Overseas Union Insurance Ltd. v. A.A. Mutual Insurance Co. Ltd.*,[20] criticised the judgments made in the *Eagle Star Insurance*[21] and *Home Insurance Co.*[22] cases by saying:

> "....., the effect of the equity clause is not clearly settled as a matter of law. Although the clause may entitle the arbitrators "to view the matter more leniently" than a court would do, I am doubtful whether they can embark on any other inquiry than what the law requires, namely finding the natural and proper meaning of the words used, in the particular context."[23]

Nevertheless, the application of the notion of amiable composition has no longer been a controversial issue in Hong Kong courts since April 1, 1990, the date when the Model Law came into force in Hong Kong. The concept of amiable composition is expressly permitted in Article 28(3) of the Model Law which stipulates that, "The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so." In other words, with parties' express authorisation, arbitrators will have the powers to decide the case as *amiable compositeurs* or decide the cases in accordance with equity. Consequently, in the case of international commercial arbitration, with the parties' express authorisation (subject to the restrictions on public policy and mandatory rules), any awards made on the basis of amiable composition under these circumstances can no longer be challenged before the Hong Kong courts.

---

[18]*Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Ll L R 357, at pp. 361-362.
[19]*Home Insurance Co. and St. Paul Fire and Marine Insurance Co. v. Administratia Asigurarilor de Stat* [1983] 2 Ll L R 674, 677.
[20][1988] 2 Ll L R 63, 72.
[21]*Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Ll L R 357, at pp. 361-362.
[22]*Home Insurance Co. and St. Paul Fire and Marine Insurance Co. v. Administratia Asigurarilor de Stat* [1983] 2 Ll L R 674, 677.
[23][1988] 2 Ll L R 63, 72.

In fact, Article 28(3) is intended to confirm the parties' rights to offer international arbitrators the power to decide the case as *amiable compositeurs* while sitting in Hong Kong; however, an issue arising in this instance is whether Hong Kong courts recognise international awards decided on such a basis, but made in a foreign jurisdiction. It is suggested by the present writer that the answer to this question is "yes". A petition of recognition or enforcement of an international arbitral award made on the basis of amiable composition will only be refused by a national court on the grounds of mandatory rules and public policy. With respect to the courts in Hong Kong, the arguments about mandatory rules and public policy can no longer to be sustained because the notion of amiable composition is recognised in the new Arbitration Act. As a result, if in an international commercial arbitration held in Hong Kong arbitrators are allowed to decide the case on the basis of amiable composition, it would appear to be illogical to conclude that Hong Kong courts would refuse to recognise or enforce a foreign arbitral award which was also decided on the basis of amiable composition, since the mandatory rules and public policy exceptions can no longer be argued on this basis before Hong Kong courts.

10.2 China

10.2.1 Background study

International commercial arbitration plays a significant role in international commercial and economic activities conducted between Chinese enterprises and Western investors. From the Western investor's point of view, given their lack of confidence in the litigation procedures in Chinese courts, arbitration appears a more desirable way to settle the disputes between them and the Chinese counterparts. From the Chinese Government's viewpoint, attracting foreign investment in order to strengthen its economic system has been the most important policy of the past twenty years. The Chinese Government will consider any method which helps to achieve this goal. As

far as the international commercial dispute resolution mechanism is concerned, the Chinese Government has decided to have international commercial and economic disputes resolved by means of arbitration, after recognising that compulsory litigation was a factor stopping foreign investors investing in China.

Nowadays, in fact, Chinese authorities not only approve but also encourage the use of arbitration as an alternative way to settle the disputes arising from international commercial and economic activities (such as joint ventures, the processing of materials, construction, transfer of technology, leasing and maritime disputes).[24] Two arbitration institutions are in the main dealing with the various disputes submitted to arbitration. One is the China International Economic and Trade Arbitration Commission (CIETAC)[25] which annually receives more than 300 international cases.[26] The other one is the China Maritime Arbitration Commission (CMAC) which normally receives 14-15 cases every year.[27] Although *ad hoc* arbitration is allowed in the Chinese arbitration system, most parties prefer to have disputes submitted to the CIETAC. Because of the importance of CIETAC in international commercial arbitration, in this research the discussion will mainly be focused on the rules of the CIETAC and the relevant arbitration laws.

A few decades ago, the development of international commercial arbitration was not a great priority in the Chinese legal system. Between 1949 and 1978, China was against the concept of capitalism which prevailed in the West. As a result,

---

[24]Certain disputes relating to marriage, adoption, maintenance, succession, and administration are not arbitrable under the Arbitration Law 1994. Chi, Shaojie, "Arbitration Mechanism to be Updated in China", (1995), *Int'l Bus.Lawyer* 16, at p. 16.

[25]CIETAC was formerly known as the Foreign Trade Arbitration Commission (FTAC). In 1989 it was renamed the China International Economic and Trade Arbitration Commission (CIETAC).

[26]Sanders, *International Handbook on Commercial Arbitration*, (2nd. ed., 1994), Chapter on China at p. 3.

[27]*Ibid.* at p. 4. According to Moser, "China and the Enforcement of Arbitral Awards", (1995) *Arbitration*, 46, which stated: "the number of cases handled by CIETAC and CMAC has grown dramatically. At present, nearly 400 cases are pending before CIETAC and CMAC tribunals; the cases involve parties from more than 25 different countries." (Data provided by the Secretariats of CIETAC and CMAC) , at p. 47 in February 1995.

international trade between China and foreign states was limited to Communist countries, such as the former Soviet Union, Eastern Europe and Cuba. At that time, there was no need for China to develop its arbitration system because the international arbitration system in those communist countries was also under-developed. During this period, China only had the Arbitration Act 1956 to deal with both domestic and foreign related arbitration. Compared to the arbitration laws which were in force in some major arbitration countries at that time, such as the English Arbitration Act 1950, the Chinese Arbitration Act 1956 was regarded as outdated on the ground that too many restrictions were imposed on arbitration.

After experiencing economic difficulties and poverty which had existed in the country for more than three decades, in 1978 China decided to modify its economic policies from a highly centralised planned economy to a market economy. The "open-door policy" was adopted in order to achieve this goal. Following this policy, China started to attract foreign investors. Nevertheless, unstable political and judicial systems in China upset the plan to attract Western investors. In order to carry out its policy successfully, on the one hand China created the so-called Economic Special Zones which were designed to open to the outside world, and on the other hand, promoted arbitration as an alternative method to settle international disputes between Chinese and foreign investors. This change in the Chinese economic framework gave international commercial arbitration a great chance to develop and flourish in the Chinese legal system.

Between 1978 and today, China has enacted a number of laws regulating international arbitration to carry out its open-door policy and fulfil its economic development aims. For instance, the Law of the People's Republic of China on Chinese-Foreign Equity Joint Venture, 1979;[28] the Law of the People's Republic of China on the Exploitation

[28]See Sit, (ed.) *Commercial Laws and Business Regulations of the P.R. of China, Hong Kong*, (1983), at pp. 326-328.

of Off-Shore Petroleum Resources in Co-operation with Foreign Enterprises, 1982; the Law of the People's Republic of China on Civil Procedure 1982;[29] the Law of the People's Republic of China on Economic Contracts Involving Foreign Interests 1985;[30] the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures 1988; the Law of the People's Republic of China on Wholly Foreign-owned Enterprises 1986; the Law of the People's Republic of China on Civil Procedure, amended in 1991, and the Arbitration Law of the People's Republic of China 1994.[31]

While China attempted to create a more friendly atmosphere for the development of international commercial arbitration, the CIETAC also enacted new rules in order to administer international arbitration held in China. First of all, replacing the Provisional Rules of Procedure of the Foreign Economic and Trade Arbitration Commission which were enacted in 1956, the CIETAC amended its Arbitration Rules on 12 September 1988.[32] Not long after this amendment, the CIETAC decided to amend the Arbitration Rules 1988 once again. This time, they decided to amend the 1988 Rules by following the UNCITRAL Model Law as a guideline. The new Arbitration Rules of the CIETAC were adopted on March 17, 1994, and came into force on 1 June 1994. The 1994 Rules were designed to improve the deficiencies of the 1988 Rules. It is regarded as a big step for China to keep up with the liberal trend prevailing in international commercial arbitration.[33] Among the laws and rules regulating international arbitration in China, the CIETAC Arbitration Rules 1994 and the Arbitration Law 1994 are regarded as the most important legal documents. Both of

---

[29] It is for trial implementation.

[30] For English Translation, Consult with *China Economic News*, Beijing, 1 April 1985.

[31] Several regulations were also promulgated. For instance, the Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade, 6 May 1954; The Regulations for the implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures 1983.

[32] The Arbitration Rules came into force in January 1, 1989.

[33] Chi, "Arbitration Mechanism to be Updated in China", (1995) *Int'l Bus.Lawyer* 16, at p. 16.

them adopt the important theories accepted by the major arbitration countries, such as, party autonomy, independence of arbitration agreements and "competence and competence".

As far as the choice of the substantive law is concerned, apart from the cases where the application of Chinese law is mandatory,[34] party autonomy is respected. The parties' freedom to choose the substantive law is embodied in Article 145 of the Civil Code[35] and Article 5 of the Foreign Economic Contract Law.[36] This principle was reaffirmed in an opinion issued by the Supreme People's Court, which stated that the choice of law may be made by the parties either at the time of signing of the contract or later after a dispute has arisen and in either case the courts will be bound by the decision of the parties.[37] Although the inclusion of a foreign governing law clause in contract between Chinese and foreign enterprises has been the exception rather than the rule,[38] international arbitrators are obliged to apply such foreign law to determine the disputes providing the parties agree.

In the case where the contract is silent as to the substantive law, arbitrators are required to apply the law which has the closest connection with the contract, such as the law of the place where the contract was concluded, or the law of the place where the contract was or is to be performed, or the law of the place of arbitration. Thirteen

---

[34]Article 5 of the Foreign Economic Contract Law specifically provides that contracts for the establishment or operation of Chinese-foreign equity joint ventures, Chinese- foreign contractual or co-operative joint ventures, and Chinese- foreign co-operative exploration and development of natural resources shall be governed by the laws of China. See Chang, "Comparative Survey of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission", (1992) 9(4) *J.I.A.* 93, at p. 105.

[35]It stipulates: "Except where the law provides otherwise, the parties to a contract involving foreign interests may choose the law applicable to the resolution of their contractual disputes."

[36]It provides: "The parties to a contract may choose the law to be applied to the settlement of the dispute arising from the contract."

[37]Para. 2(2) of the Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law. Also see Cheng, Moser, and Wang, *International Arbitration in the People's Republic of China, Commentary, Cases and Materials*, (1995), at p. 37-38.

[38]Kaplan, Spruce and Moser, *Hong Kong and China Arbitration -- Cases and Materials*, (1994) p. 319.

guidelines were issued by the Supreme People's Court to assist arbitrators to determine the law which has the closest connection to the case. The guidelines cover disputes arising from international commodity trade contracts, loan and guarantee contracts, insurance contracts, processing contracts, technology transfer contracts, contractual projects, consultancy and design contracts, labour contracts, sale of complete sets of equipment, agency contracts, real estate contracts, movable properties and storage and custody contracts.[39] These guidelines are also followed by the CIETAC and CMAC arbitrations.

10.2.2 Acceptance of international commercial arbitral awards made on the basis of a-national principles by the Chinese courts

After an intensive literature search, few cases which discussed the application of the general principles of law, the new *lex mercatoria* or amiable composition as the substantive law of the contract in international commercial arbitration have been discovered. One reason may be that the issue was never raised before the courts because no such choice of law was exercised; alternatively, it may have been chosen but the parties did not dispute the validity of the application.

In order to ascertain whether the Chinese courts accept the notion of a-national principles, examining the CIETAC Arbitration Rules 1994 and the Arbitration Law 1994 is an alternative way to discover whether the application of the general principles of law, the new *lex mercatoria* or the notion of amiable composition is allowed before the Chinese courts . Unfortunately, both the CIETAC Arbitration Rules 1994 and the Arbitration Law 1994 are silent on this issue. Only Article 53 of the CIETAC Arbitration Rules seems to provide (indirect) evidence. It reads:

---

[39]For a full list in English, see, *Ibid.* at pp. 319-320; and Cheng, Moser, and Wang, *International Arbitration in the People's Republic of China, Commentary, Cases and Materials*, (1995), at pp. 40-42.

> "The arbitration tribunal shall independently and impartially make its arbitral award in accordance with the facts of the case, the law and the terms of the contracts, international practice and the principle of fairness and reasonableness."

Mr Tang, the author of the Chapter on Chinese arbitration in the *International Handbook on Commercial Arbitration*, is convinced that the term "the principles of fairness and reasonableness" in this rule relates to amiable composition. It is designed "in accordance with the Chinese tradition,"[40] therefore, "the tribunal may decide the case as *amiable compositeurs*, even if the parties have not so authorised it."[41] In other words, arbitrators can decide to act as *amiable compositeurs* on their own initiative even though no such powers are offered in the arbitration agreement. Furthermore, he went on to say that the arbitrator's power to act as an *amiable compositeur* cannot be excluded by the parties agreement because "it is unclear whether Article 53 of the 1994 Rules is regarded as peremptory."[42]

In fact, the concept of amiable composition was applied in an award concerning a dispute arising from the sale of station wagons between a Chinese party (the claimant) and a Japanese company (the respondent).[43] Failing to receive the additional payment outside of the contract promised by the claimant, the respondent refused to deliver the wagons and returned the letter of credit back to the claimant. The claimant claimed compensation before the tribunal. The tribunal decided in the respondent's favour and held:

> "This transaction was negotiated between the principal and the respondent before the principal authorised the claimant to sign the contract with the respondent. The claimant could not deny the above-mentioned payment, promised by the principal, and require the respondent to deliver the goods upon the contract, because it was contrary to the principles of seeking truth from the facts and *ex aequo et bono*.

---

[40]Tang, "The People's Republic of China" in van der Berg & Sanders (eds.) *International Handbook on Commercial Arbitration*, (1994), at p. 12.
[41]*Ibid.*
[42]*Ibid.*
[43]*Selected Works of China International Economic and Trade Arbitration Commission Awards (1963-1988)* Updated to 1993 (1995), at pp. 163-165.

> ...
> Based on the above-mentioned facts, and the principle of ex aequo et bono, the claimant's claim should be dismissed."[44]

With respect to the new *lex mercatoria*, Mr Tang neither suggested that the application of the new *lex mercatoria* is also regarded as "peremptory" in accordance with Article 53 of the CIETAC Arbitration Rules, nor discussed whether the term "international practice" meant the new *lex mercatoria*. Nevertheless, this gap was filled by another jurist, Guiguo Wang, who claimed that international custom has long been applied in international arbitration held in China. Using CIETAC as an example, he stated:

> "CIETAC has a tradition of adopting international practices and customs in determining the rights and obligations of disputing parties. This is so because China's commercial laws are relatively new. By relying on international practice and customs, the gaps in Chinese law can be filled. It also gives the parties concerned some certainty. With Chinese law covering various aspects of commercial transactions being adopted, CIETAC arbitral awards have begun to make reference to Chinese law. International practice and customs, however, still play an important role in the CIETAC arbitration process. Very often, they are relied upon as evidence of international commercial law."[45]

He, furthermore, took the *Wulhan jute bag* case as evidence of his statement. In this case, issues concerning letters of credit were raised. According to Mr. Wang, the arbitral tribunal frequently made reference to international practice and customs, such as the Uniform Customs and Practice for Documentary Credits, to determine the underlying issues.[46]

Nevertheless, this case only confirmed that international practice and customs could fill the gap left by the municipal laws. It does not provide a satisfactory answer to the question whether the new *lex mercatoria* is recognised as a valid choice of substantive law before the Chinese courts. Although the Chinese jurists claim that the notion of a-

---

[44]*Ibid.* p. 165.
[45]Wang, "The Unification of the Dispute Resolution System in China", (1996) 13(2) *J.I.A.* 5, at pp. 35-36.
[46]*Ibid.* at pp. 36-37.

national principles exists in the Chinese arbitration framework, and indeed, has been applied by the CIETAC, no court cases on this subject have been reported. Under these circumstances, it would be premature to conclude that the Chinese courts fully accept the application of a-national principles in international arbitral awards.

10.3 Taiwan[47]

10.3.1 Background study

In theory, a foreign arbitral award can be recognised and enforced before the Taiwanese courts under multilateral conventions, bilateral treaties and relevant domestic legislation. Nevertheless, due to its special political status in international society, the Taiwanese Government has had very few chances to access international conventions or bilateral treaties for the recognition or enforcement of foreign arbitral awards. As far as multilateral arbitration conventions are concerned, the Taiwanese Government has only ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States. In the case of bilateral treaties, the Sino-American Friendship, Commerce, Navigation Treaties 1948, which provide full faith and credit for arbitration agreements and arbitral awards, is the only bilateral treaty between the Taiwanese Government and a foreign state.[48] With respect to its legislation, the Arbitration Act 1961 contains the only domestic rules regulating commercial arbitration activities and the procedures for recognition or enforcement of foreign arbitral awards. Although the Arbitration Act 1961 was amended in 1982 and 1986, it still failed to keep up with the modern trend in international commercial arbitration because too many restrictions were imposed on procedural matters. In fact,

---

[47]In this part of the study, in case of confusion between Taiwan and the People's Republic of China, Taiwan will be used to represent the independent political and legal system in the Republic of China (Taiwan). However, the Taiwanese Government still insists on using "Republic of China" on the official legal texts. Therefore, the term "Republic of China" will be used when the legal Acts are cited.

[48]This treaty was signed between Taiwan and the United States before 1979.

international commercial arbitration has made very little progress in Taiwan between then and today.

After the promulgation of the 1961 Arbitration Act, arbitration has been accepted as an alternative method to settle disputes arising from international commercial activities in the Taiwanese legal system; however, arbitration has only been known and attracted the attention of the academics and business communities since 1993. This was the time when the *Matra Transport* case was decided against the Department of Metro Construction of the City of Taipei. The arbitral tribunal awarded the French Matra Transport Company the amount of 25 millions pounds sterling. Due to unfamiliarity in Taiwan with the mechanism of arbitration, this award caused a great deal of controversy. Among jurists and judges, a debate concerning the kind of attitude towards international commercial arbitration the Taiwanese legal system should adopt has arisen. Following the debate, both the negative and positive opinions expressed affected the development of arbitration in Taiwan. According to the negative opinions, and based on the ground that no channel for appeal existed in the arbitration mechanism, the Taiwanese Government was advised by a group of lawyers that no arbitration clause should be inserted into the contracts concluded between foreign companies and any branches of the Government in the future.

Such a hostile attitude could be observed in the earlier cases decided in the 1980s. For instance, the Taiwanese Supreme Court ruled that an arbitration agreement between the parties was invalid because the bill of lading of the main contract only had one party's signature.[49] In another case, the Taipei District Court of Taiwan decided that an arbitration agreement between two Taiwanese nationals to have their dispute arbitrated in New York was invalid. The court simply stated that, at that time, American arbitral awards were not recognised before the Taiwanese courts. Therefore, considering

[49]67-Tai-Shang-Tze 3762 ROC Supreme Court 1978.

public policy, there would be no point in the parties having their arbitration conducted in New York.[50]

In contrast, after the *Matra Transport* case, another group of lawyers believed that it was time to amend the Arbitration Act in order to keep pace with the trend in international commercial arbitration. Recognising the fact that the outdated and strict approach adopted in the Arbitration Act obstructs the development of international commercial arbitration in Taiwan and will deter the plan to promote Taiwan as the Pacific Financial Centre, the Commercial Arbitration Act Reforming Committee was set up in 1994 under the supervision of the Judicial Department to amend the existing Arbitration Act. So far, the Committee has produced a draft of the new Arbitration Act which will be introduced to the Parliament.

In fact, it is the third attempt to have the Arbitration Act amended. On June 11, 1982, in order to cope with the increasing volume of international trade and economic activities connected with Taiwanese companies, the Arbitration Act 1961 was amended for the first time. Four years later, it was amended again in 1986. After two amendments, the Arbitration Act not only failed to simplify the procedures for the recognition or enforcement of foreign arbitral awards but also to follow the trend in international commercial arbitration.

With the intention of promoting Taiwan as a substitute for Hong Kong as the financial centre of the Pacific Rim once Hong Kong returns to China, the proponents of the amendment of the Arbitration Act have urged that a more liberal approach should be adopted in the new amendment. Several points were suggested in a departmental meeting about the reform of the Arbitration Act held by the Judicial Department in June

[50]70 Su-TZE-2359, Taipei District Court, 1981. However, this judgment was widely criticised because, on the basis of the Sino-American Friendship, Commerce Navigation Treaties 1948, American arbitral awards may be enforced in the Taiwanese courts.

1994:[51] such as using precedents as the best source of arbitration law, following the trends in international commercial arbitration, for example, the unification of arbitration laws, encouraging the parties to choose a sole arbitrator (instead of arbitral tribunals), distinguishing domestic and international arbitration, publishing arbitral awards, allowing a wider scope of arbitrability and less intervention from the national courts, offering arbitrators powers in choosing the applicable laws and granting interim measures, and adopting the principles of separability of the arbitration clause, and party autonomy.[52]

In relation to the choice of law rules, party autonomy is respected. As far as the arbitrator's power in choosing the substantive law is concerned, it is stipulated that, in the absence of the parties' expressed choice of law, the arbitrators are offered a power to choose the substantive law governing the merits in accordance with the Taiwanese conflict of laws rules. In the draft of the new Arbitration Act, however, it is suggested that arbitrators should be released from the obligation of choosing the substantive law in accordance with the Taiwanese conflict of laws rules.

10.3.2 Acceptance of international commercial arbitral awards made on the basis of a-national principles by the Taiwanese courts

Under the 1986 Amendment, neither the conflict of laws rules nor the concept of a-national principles is discussed; therefore, the application of the general principles of law, the new *lex mercatoria* or amiable composition is an arguable issue among Taiwanese jurists and lawyers. Dr. Chen,[53] a leading Taiwanese lawyer, believes that arbitrators do have the power to apply a-national principles to decide the disputes

---

[51] A confidential paper prepared for the Judicial Departmental meeting in June 1994 (not published).
[52] pp. 30-41 of the confidential paper prepared for the Judicial Departmental meeting in June 1994 (not published).
[53] Chen, "The Legal Status of Transnational Commercial Arbitration in the Republic of China on Taiwan", in *Private Investors Abroad*, (1992), Chapter 13.

submitted to them, even though this power is not expressed in the Arbitration Act. He found his argument in Article 1 of the ROC Civil Code, which reads:

> "In civil matters, is there is no provision of law applicable to a case, the case shall be decided according to custom. If there no such custom, the case shall be decided in accordance with the general principles of law."

He maintains that the application of a-national principles should be allowed, since the national judges of the Taiwanese courts have the power to apply custom or the general principles of law when no provision of law applicable to the issues exists. Furthermore, the application should only be subject to two exceptions: "(1) the administrative or judicial ruling upon which a transnational award has required the party to perform an illegal act; or (2) a foreign award [has] violated the ROC's imperative or prohibitive legal provisions, public orders, or good morality."[54] As he said: "the Commercial Arbitration Act ("CAA") has not singled out or penalised private denationalisation efforts under which the international trade usages or general legal principles, rather than a national legal order, may be chosen as the governing law for an arbitration."[55]

This opinion is suggested in Article 28 of the Draft of the Amendment 1997, which states: "The arbitral tribunal shall decide the dispute in accordance with law and take into account the usages of trade and equity, unless otherwise agreed by the parties." However, opinions strongly opposing the adoption of the new *lex mercatoria* and amiable composition can be seen in several symposia published in September and October 1994.[56] Among them, the Taiwanese High Court plays a leading role in this debate. The Taiwanese High Court, in fact, suggested that Article 28 should be taken out of the Draft. They argue that arbitrators may abuse their powers when they are allowed to disregard the application of law and apply the new *lex mercatoria* and

---

[54] *Ibid.* at pp. 13-24.
[55] *Ibid.*
[56] p. 48 of the symposium of September, 1994; and p. 66 of the symposium of October, 1994.

amiable composition. Furthermore, they criticised the fact that, by applying this provision, arbitrators will have greater powers than national judges. Unfortunately, no precedents concerning the new *lex mercatoria* exist to provide an indication of the Taiwanese courts' attitude on this matter. Therefore, the application of the new *lex mercatoria* as the substantive law of the contract can be seriously questioned.

As for the notion of amiable composition, it was applied in an award made in Taiwan.[57] In this case, the parties agreed to have the arbitration held in Taipei (Taiwan) and the substantive law was the relevant domestic laws of Taiwan. Nevertheless, in this award the arbitrators stated that in order to achieve the desirable justice they had decided to apply the principles of equity to decide the dispute after considering both the provisions of the positive law and the underlying contract. Without the parties' express authorisation, the arbitrators justified their decision by asserting that the Arbitration Act 1986 does not require that the power to act as *amiable compositeurs* or decide the case according to amiable composition be expressly authorised by the parties. In addition, in the arbitrators' opinion, equity is equivalent to the general principles of law. Therefore, they believed that arbitrators had the power to act as *amiable compositeurs* providing national judges can decide the case according to custom or the general principles of law and no provision of law is applicable to the case.[58]

Nevertheless, an appeal to set aside this award was allowed by the Taiwanese Supreme Court on the ground that the arbitrators acted outside the scope of their power to decide the case in accordance with equity since this power was never expressly offered by the parties.[59] The Supreme Court stated that the arbitrator's powers were based on the arbitration agreement between the parties and arbitrators

[57]Award No. 1043 Shang Jong Thin Tze.
[58]Article 1 of the Civil Code.
[59]no. 1265 Tai-Shang, The Supreme Court, 1994.

should not decide the dispute by exercising more powers than they were offered. Instead of deciding the case on the basis of amiable composition, the arbitrators should have taken the parties' agreement on the choice of law into account and applied the Taiwanese domestic laws to the dispute submitted to them. As a result, this award was set aside. However, the Taiwanese courts have never provided a clear answer to the questions of whether the application of a-national principles is allowed in the Taiwanese courts and whether, with the parties' authorisation, the Taiwanese courts will recognise the notion of amiable composition as a valid choice of proper law.

Summary of Part Three

As outlined in the examination carried out in Part Three of this thesis, it is evident that the degree and process of acceptance of the application of a-national principles in international commercial arbitration varies from country to country. Among the six jurisdictions examined in this part of study, France has historically been significant for being arbitration friendly; whereas, during different periods, both the United States, Hong Kong and England have displayed similar hostility towards this issue during the development of arbitration in their legal systems. While the notion of a-national principles has been developed or applied in the Western arbitration community, it is still an unfamiliar phenomenon in China and Taiwan with their rather short history of international commercial arbitration.

Compared to the development of English arbitration laws, France and the United States seemed to reach a stage of development in international commercial arbitration twenty years ahead of their English counterpart. This is reflected in the French 1981 Decree and the American Federal Arbitration Act which are more flexible and liberal

towards international commercial arbitration (particularly the issues of choice of the proper law).

A century after the case of *Swift v. Tyson,*[1] with the efforts made by the United States Supreme Court in a series of leading cases (as discussed in Chapter Nine), the idea that "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states"[2] was confirmed in the American judicial system. Generally speaking, though famous for the issue of arbitrability, the *Mitsubishi* case was in addition regarded as a demonstration of the arbitrator's function in applying public law. In other words, arbitrators are allowed to render private international justice on certain subjects, even though it is against American domestic public policy. The contribution made by these cases is a formal recognition of the justice provided by what is in effect a transnational private judicial system. Throughout the development from *Swift v. Tyson*[3] to the *International Standard Electric Corp.* case,[4] the validity of awards made on the basis of a-national principles has been recognised by the American courts.

Influenced by the statements made by Denning L.J. (as he was) who said: "there is not one law for arbitrators and another for the court. There is one law for all,"[5] for decades, arbitration, instead of being a substitute for litigation, has had a comparatively close connection with the courts in England. As Mustill and Boyd stated: "The law of private arbitration is concerned with the relationship between the courts and the arbitral process."[6] Consequently, both the judges and the legislators

---

[1]41 US (16 Pet) 1, (1842)
[2]473 US 614 (1985) at 636.
[3]41 US (16 Pet) 1, (1842).
[4]745 F. Supp. 172 (S.D.N.Y. 1990).
[5]*David Taylor & Son Ltd. v. Barnett Trading Co.* [1958] 1 W.L.R. 562, 570.
[6]Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, (2d ed. 1989), at p. 3.

have been rather conservative in reacting to the development of international commercial arbitration.

However, there has been gradual development in the leading case of *Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)*,[7] English courts recognised the application of the new *lex mercatoria* as a valid choice of law governing the substance of a dispute. With the very recent efforts to catch up with continental systems, the notion of amiable composition has been officially confirmed in section 46(1) of the Arbitration Act 1996, which provides "the tribunal shall decide the dispute, if the parties agree, in accordance with such other considerations as are agreed by them or determined by the tribunal."

Nevertheless, the acceptance in China and Taiwan of the concept of amiable composition has come even later than in England. While the debate concerning whether a-national principles shall be adopted in the new Arbitration Act continues among Taiwanese jurists and scholars, Chinese judges have produced no cases on this subject. Although it has been suggested by a number of scholars that, theoretically, both the new *lex mercatoria* and amiable composition can be applied by arbitrators and will be recognised by the courts, without the evidence handed down by the judge, such a suggestion does not provide a convincing ground for such a view.

---

[7] *Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil)* [1987] 3 WLR 1023.

PART FOUR

Finding a More Appropriate Theory to Interpret the Application of A-National Principles

Introduction to Part Four

While the application of a-national principles in international commercial arbitration may contradict mandatory rules or public policy of certain jurisdictions, the validity of a choice of a-national principles is uncertain. In this part of this thesis, the issue of awards based on a-national principles will be examined from a different angle. Instead of following the traditional arguments over the benefits or deficiencies of the concept of a-national principles, this part will examine whether any existing theories provide justification for the present arbitration framework and the application of a-national principles in international commercial arbitration. First, Chapter Eleven is an examination of the various theories which have been suggested by jurists throughout the development of international commercial arbitration. They include the jurisdictional, contractual, hybrid and autonomous theories. An evaluation of these theories is also provided in this chapter. Finally, in Chapter Twelve, a more appropriate approach to illustrate the existing arbitration framework will be suggested; it will also contain an examination of whether this new theory can also provide a satisfactory justification to the application of a-national principles in international commercial arbitration.

Chapter Eleven

A study of the nature of international commercial arbitration and an evaluation of the theories

From Part Three, it has been seen that different attitudes towards the application of a-national principles, such as the general principles of law, the new *lex mercatoria* or amiable composition, as the proper law to decide the merits of a dispute in international commercial arbitration have been held by different national courts. One explanation of this is the fact that different national courts adopt different theories in relation to international commercial arbitration. Generally speaking, the various commentaries about the nature of arbitration have been collected into four different theories: the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory.

Among them, the jurisdictional theory is based on the complete supervisory powers of states to regulate any international commercial arbitrations within their jurisdiction, whereas the contractual theory argues that international commercial arbitration originates from a valid arbitration agreement between the parties and that, therefore, arbitration should be conducted according to the parties' wishes. The hybrid theory stands as a compromise between the jurisdictional and contractual theories. It maintains that international commercial arbitration has both a contractual and a jurisdictional character. The autonomous theory, which has been developed more recently, dismisses the traditional approach and places emphasis on the purpose of international commercial arbitration. Instead of fitting arbitration into the existing legal framework, the autonomous theory defines arbitration as an autonomous institution, which should not be restrained by the law of the place of arbitration. As a result,

parties should have unlimited autonomy to decide how the arbitration shall be conducted.

Since the theory a national court applies in respect of international commercial arbitration also affects its attitude towards the choice of the proper law, in this Chapter a detailed discussion of the four theories will be presented by studying their effect on several different aspects of international commercial arbitration. Both the arguments and evaluation of each of the four theories will be discussed by, first, looking into the nature of international commercial arbitration to see how each theory defines the mechanism of international commercial arbitration and the kind of relationship that should exist between arbitration and national courts. Secondly, the nature and scope of the arbitrator's power will be discussed from the viewpoint of the relationship between the arbitrators and the parties. Thirdly, the status of arbitral awards under the different theories will be studied in order to examine the conflicts arising at the enforcement stage. Finally, the issue of the choice of the proper law will be discussed.

11.1 The jurisdictional theory

The jurisdictional theory invokes the significance of the supervisory powers of states, especially those of the place of arbitration. Although the jurisdictional theory does not dispute the idea that an arbitration has its origin in the parties' arbitration agreement, it maintains that the validity of arbitration agreements and arbitration procedures needs to be regulated by national laws and the validity of an arbitral award is decided by the laws of the seat and the country where the recognition or enforcement is sought. Proponents of the jurisdictional theory maintain that all arbitration procedures have to be regulated by the rules of law chosen by the parties if there are any and those rules of law in force in the place of arbitration. They also believe that arbitrators resemble

judges of national courts because the arbitrators' powers are drawn from the states by means of the rules of law. As with judges, arbitrators are required to apply the rules of law of a specific state to settle the disputes submitted to them. Moreover, the awards made by the arbitrators are regarded as having the same status and effect as a judgment handed down by judges sitting in a national court. As a result, they maintain that the awards will be enforced by the court where the recognition or enforcement is sought in the same way as judgments made by the courts.

Proponents of the jurisdictional theory stress, in particular, the significance of the seat of arbitration. For instance, Dr. Mann[1] emphasized the significance of the laws of relevant states to an arbitration, especially the law of the place where the arbitration takes place, that is, the *lex fori.* The premise of Dr. Mann's argument is that every sovereign state is entitled to approve or disapprove the activities carried out within its territory.[2] Following this premise, consequently, every arbitration is subject to the law where it takes place. Moreover, an arbitrator is required to carry out the arbitration proceedings in accordance with the will of the parties' to the extent that the *lex fori* allows. Any acts of arbitrators that contradict the mandatory rules and public policy of the place of arbitration are regarded as judicially unjustified.[3] In other words, the various issues arising from international commercial arbitration, such as the validity of the arbitration agreement, the arbitral procedures, the arbitrator's power, the scope of submission and the enforceability of arbitral awards, have to be decided within the mandatory rules and public policy of the *lex fori.* Failing to do so, the awards may be set aside by the court of the place of arbitration; furthermore, recognition or enforcement of the awards may be refused by the courts of the enforcing states.

---

[1]Mann, "*Lex Facit Arbitrum*", reprinted in (1983) 2(3) *Arbitration Int.* 245; also see Mustill, "Transnational Arbitration in English Law", (1984) 37 *Curr.L.Pr.* 133, p. 142.
[2]*Ibid.*
[3]Mann, F., "State Contracts and International Arbitration", (1967) 42 *Brit.Yrbk.Intl.L.* 10, at pp. 14 and 16.

Regarding the relationship between arbitration and the national courts where the arbitration takes place or the courts where recognition or enforcement of the arbitral awards is sought, the jurisdictional theory provides a strong basis for the national courts exercising supervisory powers over the arbitration.[4] Such supervisory powers are also confirmed in the New York Convention 1958. For instance, in accordance with Article V, in the absence of the express choice of law, the validity of arbitration agreements,[5] arbitral awards,[6] the composition of the arbitral authority and the arbitral procedures[7] have to be decided in accordance with the law of the country where the arbitration takes place. Also, the supervisory powers over the validity of arbitral awards can be exercised by the courts where recognition or enforcement is sought, if the subject matter of the difference is not arbitrable under the law,[8] or the enforcement of such an award would be against its public policy.[9]

In relation to the supervisory powers of the national courts where the arbitration takes place, the jurisdiction over the arbitration, which might have no connection with this country, is based on three theoretical arguments, namely, the arbitrator's right to make binding adjudications is derived from a delegation by the state of its exclusive powers in this field, that every act is subject to the law in force where it occurred, and the application of the *lex fori* and the use of its courts are sometimes more efficient than any other system.[10] In practice, such supervisory powers can be conferred by law;[11] for instance, in Scotland, subject to the exceptions of consumer matters, exclusive jurisdictions and prorogation, the jurisdiction of Scottish courts over the parties to an

[4]With the exception of Belgium.
[5]Art. V (1) (a) of the New York Convention.
[6]Art. V (1) (e) of the New York Convention.
[7]Art. V (1) (d) of the New York Convention.
[8]Art. V (2) (a) of the New York Convention.
[9]Art. V (2) (b) of the New York Convention.
[10]Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US, and West German Law*, (1989), at p. 63 (hereinafter Samuel, *Jurisdictional Problems*).
[11]Model law countries provide a basis for such supervisory powers for non-citizens.

arbitration held in Scotland is granted in rule 2(13) in Schedule 8 to the 1982 Act, which states that a person may be sued: "In proceedings concerning an arbitration which is conducted in Scotland or in which the procedure is governed by Scots law, in the Court of Session."[12]

Arbitrability is a good example to illustrate the issue of jurisdiction over the arbitration proceedings and arbitral awards. In relation to supervisory powers over the arbitration proceedings, arbitrators can only deal with a dispute to the extent that the law to which the parties have subjected to it allows;[13] however, such a choice cannot overrule the mandatory rules of the *lex fori.* In the absence of the parties' express choice of law, the issue of arbitrability will be governed by the law of the place where the arbitration takes place. An arbitral award may be challenged before the courts if the arbitrator deals with disputes that are outside the scope of arbitrability under the applicable laws, for example, the *lex arbitri* or the *lex loci contractus*, chosen by the parties, and possibly under the *lex fori* if the arbitration is running under the concurrent procedural rules of law in the place of arbitration.

In addition, under the jurisdictional theory, the courts in the country where recognition or enforcement is sought also have a supervisory power over the issue of arbitrability at the stage of recognition or enforcement. Accordingly, under Article V (2) the courts have the discretion to refuse to recognise or enforce an arbitral award if it finds that "The subject matter of the difference is not capable of settlement by arbitration under the law of that country"[14] or "recognition or enforcement of the award would be contrary to the public policy of that country."[15] The same approach has also been adopted by the United States Supreme Court, which confirmed the federal policy

---

[12]It is also discussed in Anton and Beaumont, *Private International Law - A Treatise from the Standpoint of Scots Law*, (2nd ed. 1990), at pp. 356-359.
[13]Article V 1 (a) of the New York Convention.
[14]Article V (2) (a) of the New York Convention.
[15]Article V (2) (b) of the New York Convention.

favouring arbitration in the *Mitsubishi* case.[16] The *Mitsubishi* case involved an anti-trust dispute which was prohibited from being resolved by means of arbitration in a domestic case. The United States Supreme Court enforced the parties' arbitration agreement involving an anti-trust dispute, even assuming that a contrary result would be forthcoming in a domestic context;[17] as Justice Blackmun pointed out - "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed."[18] It is because that "The convention reserves to each signatory country the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to the public policy of that country."[19] Based on this argument, one may be able to say that the relationship between the courts and arbitration is of a supervisory nature in accordance with the jurisdictional theory.

In relation to the status of arbitrators, the jurisdictional theory mainly follows the approach of the delegation theory. According to the delegation theory, in order to settle disputes between parties, an arbitrator must possess a delegated authority given by a state in which he sits to conduct an arbitration. An award made by an arbitrator lacking this authority will be void and can be challenged. Due to this delegated power, the proponents of the jurisdictional theory deny that the arbitrator's power is originated from the parties' arbitration agreement. They maintain that the arbitrator's power is drawn from the state by means of the local law on the ground that it is in the public interest to permit private individuals to decide disputes when the parties have agreed. This is the argument supported by Mr. Moutulsky, who said that "Arbitrators are individuals whom the legal system permits to perform a function that is in principle

---

[16]*Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1984), 87 L.Ed. 2d 444, 105 S.Ct. 3346.
[17]*Ibid.* at p. 629.
[18]*Ibid.* at p. 638.
[19]*Ibid.* at p. 638.

reserved to the state";[20] furthermore, arbitration is regarded as an exception granted by the state to its monopoly over the administration of justice in its jurisdiction.[21]

Because of the special status granted by the states, arbitrators are regarded as resembling judges of national courts. The only difference between them, as illustrated by Niboyet, is that a judge "derives his nomination and authority directly from the sovereign," whilst an arbitrator "derives his authority from the sovereign but his nomination is a matter for the parties."[22] Following this argument, an arbitrator, similar to a judge, is also required to follow the law and observe the mandatory rules and public policy of the *lex fori* to settle the dispute between the parties.

Indeed, the jurisdictional theory provides a strong argument about the status of arbitrators and the origins of their powers; nevertheless, from the present writer's own observations, the statement that arbitrators inherit power from the state appears to be incomplete to describe the present arbitration framework. Not only do the arbitrators but also the mechanism of international commercial arbitration inherit judicial power from the state. It is difficult to deny that the arbitration mechanism would be crippled and the arbitral procedures and awards would be regarded as unlawful or void without authorisation from the states. By means of legislation, within certain limits, the states allow parties to choose arbitration as an alternative method of settlement outside the traditional court systems. Furthermore, after recommending or legalising arbitration as an alternative means of dispute settlement, the states offer the arbitrators a quasi-judicial status which allows them to act as arbitrators and settle the disputes between the two parties. Because of this quasi-judicial status, arbitrators are granted certain powers and immunities with the intention of safeguarding the public interest and the

[20]Moutulsky, Ecrits, Dalloz, Paris, (1974) at p. 14; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 55.
[21]*Ibid.*
[22]Niboyet, *Traité de Droit International Privé Français*, Paris, (1950), para. 1985, at p. 137; cited from Lew, *The Applicable Law in International Commercial Arbitration*, (1978), at p. 53 (hereinafter Lew, *Applicable Law*).

efficiency of arbitration procedures; furthermore, they are given the power to avoid unreasonable obstacles or deliberate delays made by the parties during the arbitration procedures. Finally, the decisions made by the arbitrators are regarded as binding on the parties, provided no irregularities listed in Article V of the New York Convention can be established. In accordance with this argument, in order to provide a complete picture of arbitration, it would be more appropriate to stress that not only the arbitrators but also the mechanism of international commercial arbitration inherit the judicial powers from the states.

The nature of arbitral awards is also examined under the jurisdictional theory. In accordance with this theory, an arbitral award should be granted the same status and effect as a judgment made by a national court judge since arbitrators are regarded as resembling judges. Because of a similar status to judgments, in the absence of the voluntary performance of the award by the losing party, the awards will have to be enforced (in the same way as a judgment) by the court where the recognition or enforcement is sought.

This idea corresponds with the viewpoint of Lainé', who invokes the idea that the arbitral awards have a similar effect to judgments.[23] Lainé agreed that no arbitration can legally exist or be performed without the parties' agreement; however he denied that the parties' arbitration agreement constitutes the jurisdiction of the arbitration. Lainé's view is also agreed to by Pillet, who went a step further and argued that the arbitration agreement was irrelevant once the arbitrator has been appointed. He stated:

> "The arbitration agreement is necessary to give the arbitrators their authority, but once that authority has been conferred on them, provided they keep within the limits of the task given to them, their freedom is absolute and the arbitration

[23]Lainé, "De L'éxécution en France des Sentences Arbitrales Étrangeres", *J.D.I.* 26 (1899), 641 at p. 650; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 36.

> agreement has no influence on their award which is based on quite different matters."[24]

The same opinion can also be found in Klein's work:

> "... the State alone has the right to administer justice, so that if the law allows the parties to submit to arbitration, this institution could be exercising a public function, from which logically it must be concluded that the award is a judgement in the same sense as the decisions rendered by the judges of the State."[25]

Regarding the choice of the proper law, in most jurisdictions judges of national courts, while dealing with an international commercial disputes submitted to them, are only allowed to apply the law of their own country or the national laws of other states if the parties so choose. Alternatively, in the absence of the parties' express choice of the proper law, they have to choose the substantive law in accordance with the choice of law rules of the place where they sit. In other words, for the judges of national courts, in respect of the choice of law issue, they are not allowed to go beyond the scope of national laws to decide the merits of the disputes.

Based on the same territoriality principle which leads to a close relationship between the place of arbitration and the procedural rules to be applied to international commercial arbitration, under the jurisdictional theory arbitrators are only allowed to choose the proper law of the contract in accordance with the procedural law chosen by the parties if there is any, and the *lex fori*. As a scholar stated: "The effect of this theory is to allow arbitrators no greater freedom in the application of substantive law than judges have."[26]

---

[24]Pillet, *Traité Pratique de Droit International Privé*, Vol. 2 at p. 537; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 52.
[25]Klein, *Considérations sur L'arbitrage en Droit International Privé*, para. 105, at pp. 181-2; cited in Lew, *Applicable Law*, (1978), p. 52-53.
[26]*Ibid.* at p. 53.

In addition, adopting the territoriality principle, arbitrators are required to decide the issues arising from international commercial arbitration according to municipal laws, which also include the choice of law rules of the place where the arbitration is held. Some scholars who have a more liberal attitude maintain that, under the jurisdictional theory, the power to choose a-national principles or decide *ex aequo et bono* or according to the rules of professional bodies, may be given by the parties to the arbitrators "only if the law of the place of seat of the arbitral tribunal so authorises them."[27]

However, this liberal idea was not shared by Dr. Mann. He not only highlighted the importance of the *lex fori*, but also went a step further to deny the existence of "international" commercial arbitration. First of all, he said that no definition of international commercial arbitration has been provided despite that "Numerous attempts have been made in recent years to define an "international commercial arbitration". They have failed to produce any clear formula, nor is it certain whether an effective formula, if it were to be found, would constitute a useful contribution rather than a sterile exercise."[28]

Dr. Mann asserted that, in accordance with a strict interpretation, every arbitration is a national one and it should be governed by the municipal laws of the country where it is held. The so-called "international" arbitration is, in fact, a fallacy,[29] since no arbitration can exist in a legal vacuum. Dr. Mann strongly criticised the delocalisation theory and the autonomous theory[30] which maintained that international commercial arbitration should be free from the restraints of the *lex fori*. He argued: "In the legal sense no international commercial arbitration exists. Just as, notwithstanding its

---

[27]Luzzatto, "International Commercial Arbitration and the Municipal Law of States", (1977) IV *Rec.des Cours* 9, at p. 52.
[28]Mann, "*Lex Facit Arbitrum*", reprinted in (1986) 2(3) *Arbitration Int.* 245, at p. 244.
[29]*Ibid.*
[30]It will be discussed in a later section of this chapter.

notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law."[31]

As well as the procedural matters, in Dr. Mann's opinion the substantive issues of the dispute are also governed by the municipal laws. He stated:

> "No one has ever or anywhere been able to point to any provision or legal principle which permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derives from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact to speak of the *lex arbitri* or in French *la loi de l'arbitrage*."[32]

In Dr. Mann's opinion, any arbitration procedures, the composition of arbitral tribunals and the structure of arbitration procedures have to be subject to a national law of a specific country. Within the framework of international commercial arbitration, only the *lex fori* can provide such a complete and effective control over the arbitration procedures to decide the relevant issues arising from an arbitration. Finally, he concluded that "it would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of freedom granted by himself."[33]

Although the jurisdictional theory and Dr. Mann's arguments accurately reflect the very fundamental aspect of the existing arbitration framework, it is frequently criticised for the lack of consideration paid to the significance of arbitration agreements

---

[31] Mann, "*Lex Facit Arbitrum*", reprinted in (1986) 2(3) *Arbitration Int.* 245, at p. 245.
[32] *Ibid.*
[33] *Ibid.* at p. 246.

in the commercial world.[34] Apart from this common criticism, the present writer is of the opinion that the jurisdictional theory fails to keep pace with the current developments in international commercial arbitration. This can be illustrated in two ways: one is the ignorance of the impact of the delocalisation theory, the other is the lack of an explanation for the frequent application of a-national principles as the substantive law in international commercial arbitration.

The jurisdictional theory, which is frequently criticised, places too much influence on the *lex fori*.[35] Due to the overemphasis on the importance of *lex fori*, the jurisdictional theory ignores the importance of party autonomy and the parties' aims in seeking a more speedy and flexible method to settle their disputes outside of the court systems. By conflicting with the mandatory rules of the *lex fori*, the arrangements made between the parties for the arbitration procedures can frequently be invalidated or superseded by such mandatory rules. Because of the different restrictions which would be imposed upon arbitration by the mandatory application of the *lex fori*, this would result in uncertainty in arbitration and distortion of the purpose of international arbitration which aims to provide businessmen with an alternative way to reduce troublesome court procedures to a minimum level.

Because of the insistence on the application of the *lex fori* to arbitration procedures, the proponents of the jurisdictional theory tend to ignore the development of the delocalisation theory, which has attracted practitioners' attention since the 1960s.[36] The delocalisation theory invokes total freedom of international commercial arbitration. Accordingly, arbitration should not be bound by any laws and, especially, should not be restricted under the mandatory rules of the place of arbitration, that is, the *lex fori*.

---

[34]A detailed discussion will be carried out in the next section.

[35]Lew, *Applicable Law*, (1978), at pp. 245-255.

[36]For details, see Paulsson, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", (1981) 30 *I.C.L.Q.* 358, and "Delocalisation of International Commercial Arbitration: When and Why It Matters?", (1983) 32 *I.C.L.Q.* 53.

Although the delocalisation theory has failed to gain wide acceptance among jurisdictions, a certain impact on practice has still been made through its development. First of all, in some arbitral awards, instead of confining themselves to the restrictions imposed by the *lex fori*, arbitrators apply the law designated by the parties, and in the absence of this choice, they simply apply the rules of laws they believe are appropriate.[37] Secondly, influenced by the liberal concept of the delocalisation theory, some major arbitration states have adopted a more relaxed and flexible attitude towards international commercial arbitration held in their jurisdictions.[38]

These liberal ideas can be observed in the French Code of Civil Procedure 1981.[39] Instead of putting international arbitral awards under the scrutiny of the domestic law, first of all, the concept of "international public policy" has been brought into the French Code of Civil Procedure in order to reduce the connection between arbitration and the law of the country where the enforcement is sought. Secondly, the terms used in the New York Convention 1958 that place arbitration on a national law level, such as "under the law of the country where the award was made",[40] "under the law of the country where the arbitration took place",[41]"under the law applicable to them",[42] or "under the law to which the parties have subjected it",[43] have been removed from the legislation.

Finally, the legislation limits the grounds for refusing recognition or enforcement of arbitral awards to internationally required criteria:[44] for instance, the party seeking

---

[37]Such as the arbitral awards made under Article 13.4 of the ICC Arbitration Rules.
[38]Such as Belgium and France; details see below.
[39]Book IV 4 Arbitration, from Article 1442 to 1507. Decree Law No 81-500 of May 12, 1981.
[40]Article V (1)(a) and (e) of the New York Convention.
[41]*Ibid*. Article V(1)(d).
[42]*Ibid*. Article V(1)(a).
[43]*Ibid*. Article V(1)(a).
[44]Article 1502 of the French Code of Civil Procedure stipulates: "An appeal against a decision recognition or enforcement may be brought only in the following cases:

1. If the arbitrator decide in the absence of an arbitration agreement on the basis of a void or expired agreement;
2. If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;

recognition or enforcement of the award no longer needs to fulfil the requirements of national mandatory rules and public policy of the country where recognition or enforcement is sought.[45] In other words, in order to enforce an award before the French courts, the winning party only needs to prove that internationally recognised due process and public policy have been respected during the arbitral procedures.

This concept has also been applied to the choice of the proper law procedures. In accordance with the new legislation, in cases where the parties fail to choose the law applied to the substantive matters, the arbitrators can instead of following the traditional method of conflict of laws rules choose the applicable law they deem appropriate. [46] Meanwhile, Article 1502 of the French Code of Civil Procedure also tries to free arbitration procedures from the scrutiny of the *lex fori* by taking out terms which tend to localise arbitration, such as "under the law of the country where the award was made"[47] or "not in accordance with the law of the country where the arbitration took place".[48]

Apart from ignoring the trend of reducing the importance of the *lex fori*, the jurisdictional theory also ignores the increasing application of a-national principles as the proper law in international commercial arbitration. In accordance with the jurisdictional theory, arbitrators inherit the powers from the states to resolve the disputes between the parties and so, like the judges of the national courts, they are not only required to apply the conflict of laws rules of the *lex fori* to determine the substantive law but also required to determine the merits of the disputes on the basis of

---

3. If the arbitrator decide in a manner incompatible with the mission conferred upon him;
4. Whenever due process has not been respected;
5. If the recognition or enforcement is contrary to international public policy (*ordre public*)".

[45]Article V(2) of the New York Convention.

[46]Article 1496 of the French Code of Civil Procedure stipulates: "The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules he deems appropriate."

[47]Article V (1) (a) (e) of the New York Convention.

[48]*Ibid.* Article V (1)(d).

the rules of law of a specific nation. However, as has been seen in Part Two of this study, the compulsory application of national laws to arbitration is no longer the golden rule in international commercial arbitration. In a number of international arbitral awards, the general principles of laws, the new *lex mercatoria* and amiable composition have replaced national laws and have been applied in international trade disputes.[49] Sometimes such applications are designated by the parties, failing which, they are often chosen by the arbitrators since they may appear to be more appropriate in the circumstances.

Apart from frequently being applied in arbitral awards, the study carried out in Part Three shows that more and more legal systems take a more liberal attitude towards the application of a-national principles.[50] The arbitration laws of these countries[51] expressly allow the arbitrators to apply a-national principles to decide the disputes.[52] Moreover, arbitrators are sometimes required to take trade usages into account, or, with the parties' consent, decide the cases *ex aequo et bono* or under amiable composition.[53]

The jurisdictional theory does provide a strong argument for the judicial elements of international commercial arbitration, such as the issues concerning the nature of arbitration, the powers and immunity of arbitrators and the recognition or enforcement of arbitral awards. However, the criticisms discussed in this section highlight the incompleteness of the jurisdictional theory against the background of the current development of international commercial arbitration.

---

[49]See chapters 3,4 and 5.
[50]Kerr, "Equity Arbitration in England", 2 *The American Review of International Arbitration*, 377 (1993).
[51]For example, France, the United States and England.
[52]Article 1496 (2) and 1497 of the French Code of Civil Procedure.
[53]Article 13.4 of the ICC Rules 1988.

11.2 The contractual theory

Rejecting the significance of the *lex fori*, proponents of the contractual theory[54] argue that arbitration is based on the agreement between the parties. They deny that any strong links exist between the arbitration proceedings and the law of the place in which the arbitration takes place. They maintain that parties have the freedom to decide the relevant issues concerning the arbitration procedures and this freedom should generally not be interfered with by the powers of any states.

The contractual theory, different from the jurisdictional theory, explores the nature of arbitration from a contractual viewpoint. Although the contractualists admit the fact that arbitration proceedings and arbitration agreements can be influenced by the relevant national laws, they argue that arbitration has a contractual character that originates in the parties' arbitration agreement. Accordingly, an arbitration agreement between the parties is regarded as a contract which expressly states the parties' wish to have their disputes resolved by means of international commercial arbitration. This kind of contract is voluntarily made between the parties, and allows them to determine the time and place of arbitration, select the arbitrators to hear their case and choose the laws governing both procedural and substantive matters.

The proponents of the contractual theory believe that the settlement of the dispute in arbitration should not be influenced by the power of any states and that the concept of

---

[54]Such as Merlin, Foelix, Balladore-Pallieri, Bernard and Klein in France and Kellor, Domke and Kitagawa outside France. See Frances Kellor, *Arbitration in Action*, quoted by Stone in "A Paradox in the Theory of Commercial Arbitration", 21 *Arb.J.* 156 (1966). Domke, *Commercial Arbitration*, (1965), at p. 31, who stated that "the express intent of both parties to enter into the arbitration agreement is essential existence." Kitagawa, "Contractual Autonomy in International Commercial Arbitration", in *Liber Amicorum for Martin Domke* 133 at p. 138, who believes that "the binding force of the arbitration agreement comes from '*pacta sunt servanda*' as well as other ordinary contracts without any state authorisation".

pacta sunt servanda[55] should prevail, binding the parties to perform the arbitration agreement made between them without state's pressure. As illustrated by Kellor:

> "arbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration."[56]

Accordingly, with the exceptions of arbitrability and public policy which are reserved for the *lex fori*, the *lex fori* has very little influence over the procedures and outcome of the arbitration. Moreover, it has been concluded that "national arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration."[57]

In most jurisdictions, the mechanism of international commercial arbitration is undeniably designed on the basis of the contractual theory. Recognising the business people's desires to have a more flexible and informal method of dispute settlement, most courts tend to follow the contractual theory and interpret the relationship between the parties and the arbitrators as a contract. Taking the relationship between parties and arbitrators as an example, the contractual theory prevails in most jurisdictions. For instance, in England, in the case of *Cereals S.A. v. Tradax Export S.A.*,[58] where the court, first of all, held that a contractual relationship existed between the parties and the arbitrators. Secondly, the court stated that the arbitrators became parties to the arbitration agreement as soon as they accepted the appointment. The court observed: "It is the arbitration contract that the arbitrators become parties to by accepting

---

[55]"*pacta sunt servanda*" represents the idea that agreements should be observed.
[56]Frances Kellor, *Arbitration in Action*, quoted by Stone in "A Paradox in the Theory of Commercial Arbitration", 21 *Arb.J.* 156 (1966); and Lew, *Applicable Law*, (1978), at p. 55.
[57]Klein, *Considerations* at p. 182, Discussed in Lew, *Applicable Law*, (1978), at p. 56.
[58][1986] 2 Ll L R 301.

appointments under it. All parties to the arbitration are, as a matter of contract (subject always to the various statutory provisions), bound by the terms of the arbitration contract."[59]

A similar idea was also upheld in a recent case[60] in relation to the issue of remuneration. The court decided that the arbitrators were entitled to reasonable remuneration. This entitlement was based on a trilateral contract between the two parties and the arbitrators.[61] The implied terms of this kind of trilateral contract require arbitrators to "conduct the arbitration with due diligence and at a reasonable fee,"[62] by using all reasonable means in entering on and proceeding with the reference.[63]

Apart from cases of arbitrability and compulsory arbitration, the present writer's view is that, to a certain extent, it is correct to portray the relationship between parties and arbitrators as a contract. Moreover, the contractual relationship discussed here is, in fact, comprised of two contracts: one is the contract between the parties, that is, the arbitration agreement, while the other is the appointment agreement between the parties and the arbitrators. As far as the contract between the parties is concerned, subject to the statutory exceptions, to start an arbitration there must be a valid arbitration agreement existing between the parties. On the other hand, in relation to the contract between the parties and the arbitrators, consent from both the parties and the arbitrators is essential to form a valid appointment of the arbitrators, since the

---

[59]An injunction was granted in this case where a breach of the arbitration agreement had been committed by the arbitrators who were regarded as one of the parties to the arbitration agreement.
[60]*K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd.* [1991] 1 Ll L Rep 524 (CA).
[61]*Ibid.* p. 537, the court said: "So far as the parties are concerned, their obligations under the trilateral contract include the liability to pay remuneration for the service of the arbitrators ... The contractual obligation on Hyundai and Norjarl to pay such remuneration could not be altered without the consent of both." Also at p. 531: "Once the arbitrator has accepted an appointment, no term can be implied that entitled him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties."
[62]*Ibid.* p. 532.
[63]See s. 13(3) of the Arbitration Act 1950.

appointment of arbitrators cannot be carried out by one party's unilateral decision. In accordance with these contracts, the disputes between the parties are submitted to the arbitrators, the arbitrators carry out the arbitration and have the parties' disputes settled, and the parties then pay the arbitrators a reasonable remuneration in return for their service, that is, providing the arbitral award.

Nevertheless, the present writer cannot totally agree with the proponents of the contractual theory who claim that all arbitration is based on the arbitration agreement between the parties and that, without such an agreement, no arbitration can be operated. In the opinion of the present writer, the argument of the proponents of the contractual theory only reflects part of the present arbitration framework. The basis of their argument is that states will allow the parties to have all kinds of disputes submitted to arbitration and, moreover, an arbitration cannot exist without an arbitration agreement. As far as both premises are concerned, they can only be sustained in the case of voluntary arbitration where no non-arbitrable disputes are involved. Moreover, one question which has to be raised is the basis on which the arbitrators decide the validity of the arbitration agreements. Unfortunately, the answer can only be found in the jurisdictional theory, since, within the present arbitration framework, the validity of arbitration agreements is usually decided by the laws of the relevant countries, such as the *lex loci contractus*, the *lex fori* or the law of the recognising or enforcing states.

Proponents of the contractual theory also ignore the fact that, within the existing framework, most states do exercise powers to supervise the arbitration held in their territories and the awards brought to their national courts seeking recognition or enforcement. For instance, the issue of arbitrability displays the weakness of the contractual theory. Generally speaking, issues concerning public interests are prohibited from submission to arbitration - such as human rights, criminal cases,

family law issues, anti-trust, security disputes[64] and competition cases. Some matters, such as human rights and criminal cases, are of a public law nature and as such are reserved for the national courts to decide. Other matters, such as anti-trust, security disputes and competition cases, may relate to public interests and appear to be too complicated to be settled by means of arbitration.[65] As Redfern and Hunter point out, to safeguard the public interest, the legislators of each state may decide which matters may or may not be settled by arbitration according to their own economic and social policy.[66] Considering the different interests which exist in individual states, different states impose different restrictions on arbitrability. In other words, a dispute is only allowed to be submitted to arbitration if it is arbitrable under the laws of the states which have connections with the arbitration. Consequently, the argument made by the contractualists is inadequate to explain the case of non-arbitrable disputes since an arbitration would be invalid, with or without an arbitration agreement, if the subject matter was not "arbitrable" under the applicable laws.

Again, the contractual theory fails to cover the case of compulsory arbitration. In most jurisdictions, recognising the public interest, the need to cut litigation costs and to have public money better spent, compulsory arbitration is usually designed to be a cheap and informal dispute settlement method for particular types of disputes,[67] such as those arising from labour relationships and agricultural holdings. Accordingly, legislation expressly stipulates that certain kinds of disputes must be submitted to

---

[64]After *Mitsubishi* case, the United States Supreme Court decided that antitrust issues arising out of international contracts were arbitrable pursuant to the Federal Arbitration Act.

[65]In relation to these matters, the American courts have adopted a more liberal attitude and allow disputes related to these matters to be referred to arbitration. For a detailed discussion, see Chapter 9.

[66]Redfern and Hunter, *International Commercial Arbitration,* (2nd ed. 1991), at pp. 137-147 (hereinafter Redfern and Hunter (1991)).

[67]See Section 84 of the Agricultural Holdings Act 1986, which states:
"Any matter by or by virtue of this Act or regulations made under this Act is required to be determined by arbitration under this Act shall, notwithstanding any agreement (under a contract of tenancy or otherwise) providing for a different method of arbitration, be determined by the arbitration of a single arbitrator in accordance with the provisions of any order under this section, together with the provisions of Schedule 11 to this Act (as for the time being in force); and the Arbitration Act 1950 shall not apply to any such arbitration."

arbitration. For instance, in Scotland, the disputes between landlords and tenants of agricultural holdings must be submitted to arbitration in accordance with section 84 of the Agricultural Holdings Act 1986. Although most compulsory arbitrations are confined to domestic disputes, some disputes of an international nature may also be compelled to be settled by means of arbitration. For instance, in some cases where major international construction disputes are involved some jurisdictions, such as Hong Kong and New York, give their judges the power to send the parties to arbitration.

In the case of a compulsory arbitration, no consent of the parties or arbitration agreement is required. The basis of compulsory arbitration is the state's mandatory power to send the parties to arbitration when the dispute between them falls into a category reserved for compulsory arbitration. Because of this mandatory power, no matter whether there is an arbitration agreement between the parties or not, the parties must submit their dispute to arbitration. As we can see, the case of compulsory arbitration does not fit in well with the contractual theory.

Apart from the issues of arbitrability and compulsory arbitration, the premises of the contractual theory also fail to cover the case of multi-party arbitration. A multi-party arbitration usually occurs in international construction projects which have many parties involved, such as the employers, the main contractors, the sub-contractors and the suppliers. Although the idea of multi-party arbitration has caused a great deal of controversy and has not been adopted by many countries,[68] in certain jurisdictions,

[68]It may offend the consensual elements of arbitral procedures.

for example, New York,[69] Hong Kong,[70] British Columbia[71] and the Netherlands[72], with different amendments, the courts are permitted to make orders for consolidation of arbitration. In other words, if it is shown to be necessary, the courts in these jurisdictions are empowered to order a third party to join existing arbitral proceedings, even though no arbitration agreement legally existed between them and the original parties.[73] From the arguments suggested above which highlight the failings of the contractual theory in the areas of non-arbitrable disputes, compulsory arbitration and multi-party arbitration, the universality of the contractual theory must be in doubt.

In respect of the status of arbitrators, the contractualists reject the delegation theory which holds that arbitrators resemble judges of national courts. Among them different opinions have been expressed about whether arbitrators are the agents of the parties; however, they have failed to reach any agreement on this issue. The agent theory was invoked by Merlin,[74] who believed that arbitrators were, in fact, the agents of the parties. He dismissed the idea that arbitrators closely resemble judges of national courts and their powers and authority were drawn from the local law. He was of the opinion that, due to the fact that arbitrators did not perform any public function, arbitrators obtained their powers and authority from the parties' agreement when they

---

[69]The Courts of the New York allow consolidation of arbitration where common questions of law or fact are involved. See *Cable Belt Conveyors, Inc. v. Paul Howard Co. v. Alumina Partners of Jamaica* 857 F. 2d 1461 (2nd Cir.); however the decision was denied by the United States Supreme Court reported at 484 US 855 (1987).

[70]The Hong Kong Arbitration Act of 1982 s. 6B provides for judicially ordered consolidation in domestic arbitration. However no such provision is set in the Arbitration Ordinance (Chapter 341) 1990, which adopts the UNCITRAL Model Law for international arbitration.

[71]Section 27(2) of the International Commercial Arbitration Act of British Columbia, which allows for judicially ordered consolidation on terms the court considers just and necessary where parties to two or more arbitration agreements have agreed to consolidation in their respective agreements or otherwise. See Redfern and Hunter, (1991), at p. 189.

[72]Article 1046(1) of the Netherlands Arbitration Act 1986 provides for court consolidation of arbitration in both domestic and international cases taking place there unless the parties contract out of that provision.

[73]Although Messer Redfern and Hunter point out that it is theoretically "possible for states to confer such powers of compulsion upon arbitral tribunals" to bring the relevant third party to join the same arbitral proceedings, to the present writer's knowledge, so far, no jurisdictions offer such a power to the tribunal. See Redfern and Hunter, (1991), at p. 186.

[74]Merlin, *Recueil Alphabétique de Questions de Droit*, (4th ed.) Tarlier Brussels 1829 Vol. 9 at pp. 144; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 34.

were appointed. In short, arbitrators were appointed as the agents of the parties to resolve the disputes on the parties' behalf.[75] Being the agents of the parties, arbitrators represent the parties who appoint them to resolve the dispute according to the parties' instructions; moreover, any decisions, that is, arbitral awards, made by the agents have a binding effect on the parties.[76]

Believing that the decision-making process was wholly dependent on the arbitration agreement between the parties,[77] Foelix agreed with Merlin's argument that arbitral awards were made by the arbitrators who were regarded as the agents of the parties.[78] He claimed that the relationship between the parties and the arbitrators had a private, rather than a public, nature, - that is, a relationship of principal and agent. As a result, in this relationship no court intervention can be exercised because the sole basis of the power of the arbitrator is the arbitration agreement.

Although upholding the contractual nature of arbitration, a number of contractualists disagreed with Merlin and Foelix and claimed that arbitrators were not the agents of the parties.[79] Bernard is representative of this group. He believed that the power of the arbitrators was drawn from the parties' arbitration agreement which allowed the arbitrators to judge. However, he denied that the arbitrators were the agents of the parties. In fact, he maintained that the agreement between the arbitrators and the parties did not fit into any of the established categories of contracts;[80] furthermore, "it is a

---

[75]*Ibid.* at p. 144. See Lew, *Applicable Law*, (1978), pp. 54.

[76]Accordingly, in some commodities arbitration, in the case of price disputes oversmen appointed by the parties to put a reasonable price forward are regarded as the agents of the parties.

[77]Both Merlin and Foelix regarded compulsory arbitration as outside their definition. See Merlin, *Recueil Alphabétique de Questions de Droit*,(4th ed.) Tarlier Brussels 1829 Vol. 9 at p. 144; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 34.

[78]Foelix, J., *Traité du Droit International Privé*, (2nd ed. 1847) at p. 461; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 35.

[79]Balladore-Pallieri, G., "L'Arbitrage Privé dans les Rapports Internationaux", 51 *Recueil des Cour*, 285, Bernard, A., *L'Arbitrage Volontaire en Droit Privé*, (1937) 28, Klein, F-F., "Autonomie de la Volonté et Arbitrage" 47 (1958) *Rev. Crit.* 255; discussed in Samuel, *Jurisdictional Problems*, (1989).

[80]Bernard, A., *L'Arbitrage Volontaire en Droit Privé*, (1937) 28 at p. 152; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 41.

contract *sui generis*, governed by rules appropriate to it and which must be dealt with by taking into account both the principles governing contracts in general and the particular nature of the function exercised by the arbitrator."[81] Bernard's argument was supported by Klein, who stated that "The arbitral agreement is the work of the parties alone. The award is the work of the arbitrators. The appointment of the arbitrators is the work of the parties and the arbitrators together."[82]

Not only do the contractualists fail to reach an agreement on the agent theory, Merlin's agent theory is strongly criticised by Lainé.[83] As Lainé points out, the functions of arbitrators are contradictory to the agent theory. With respect to the relationship between principal and agent, the agent works on the principal's behalf in their best interest. However, according to Lainé, this does not apply to the relationship between arbitrators and the parties within the present arbitration framework. Three reasons have been given by him. First, unlike agents, arbitrators are appointed to resolve the dispute between the parties independently and impartially, rather than being appointed to fight for the best interests of the party who appointed them. In fact, arbitrators are obliged to determine the rights of the parties in an impartial manner since they owe an equal obligation of fairness to both sides.[84] Following this logic, it is impossible for arbitrators, acting as agents, to fight for the best interests of the parties who appointed them since it is against the underlying fundamental duties of the arbitrators.

Secondly, arbitrators are required to be financially independent from the parties who appoint them.[85] Under these circumstances, the same questions are raised. How can

---

[81] *Ibid.*

[82] Klein, F-F., "Autonomie de la Volonté et Arbitrage" 47 (1958) *Rev. Crit.* 255, at p. 260; translation from Samuel, *Jurisdictional Problems*, (1989), at pp. 43-44.

[83] Lainé, "De L'exécution en France des Sentences Arbitrales Etrangères", 26 *J.D.I.* 641; discussed in Lew, *Applicable Law*, (1978), at pp. 52-61.

[84] Mustill & Boyd, *Commercial Arbitration*, (2nd ed. 1989), at p. 43.

[85] Some commentators criticise the contractual theory on the basis that it fails to explain the nature of the duty of the arbitrator to give the parties an impartial and fair hearing - commentators such as Weiss, Balladore-Pallieri, Bernard and Klein.

arbitrators work for the parties' best interests when they are supposed to act impartially and independently? And how can arbitrators work for the parties' best interests when both parties' interests are in conflict?

Thirdly, the agent theory is also criticised over the different scope of the agent's and the arbitrator's powers. In accordance with the agent theory, agents represent the principals within the scope of the authorisation. Agents can only decide on the matters authorised by the principals. The decision made by the agent is regarded as a contract which has a binding effect on the principal. However, this description does not fit into the relationship between the parties and the arbitrators. In fact, the agent theory contradicts reality since arbitrators can perform functions which can never be performed by the parties, such as the power to summon witnesses in certain countries or order security of costs against one of the parties

The contractual theory also fails to provide a satisfactory answer about the arbitrator's immunity. Arbitrator's immunity is designed to avoid proceedings being brought against arbitrators by a dissatisfied party during or after the arbitration procedures. Though different scopes of immunity are granted by different jurisdictions, generally speaking arbitrators enjoy a quasi-judicial immunity from suit for any errors or omissions. For instance, in France, though no legal texts governing the issue of arbitrator's immunity exist in the French law, generally it is recognised that the party in question should file an appeal against the award for annulment before raising a claim of liability against the arbitrators. In England, an absolute immunity is granted to arbitrators as the House of Lords indicated in the cases of *Sutcliffe v. Thackrah*[86] and *Arenson v. Arenson:*[87]

---

[86][1974] AC 727. In this case, Lord Reid stated: "There is nothing judicial about an architect's function in determining whether certain work is defective. There is no dispute. He is not jointly engaged by the parties. They do not submit evidence as contentions to him. He makes his own investigations and comes to a decision." at pp. 737-738.

[87][1977] AC 405. Similar to the case of *Sutcliffe v. Thackrah*, the House of Lords also refused to grant accountants immunity for the errors they made while valuing the shares in a private company.

> "It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This is not because the law regards any of these with special tenderness but because the law recognises that, on balance of convenience, public policy demands that they shall all have such an immunity. It is of great public importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation."[88]

And,

> "Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred."[89]

The courts in the United States have gone further than the English courts on the issue of immunity. The United States courts not only offer immunity to arbitrators but also to arbitration institutions[90]. The common law doctrine of judicial immunity was first recognised in the case of *Bradley v. Fisher*[91] on the ground that: "If civil actions could be maintained in such cases against the judges, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away."[92] The same immunity is also extended to arbitrators whose jobs have traditionally been construed to be quasi-judicial in nature,[93] since the United States courts have been convinced that arbitrators usually do not have any interest in the outcome of the awards. Arbitrators are simply appointed to perform a functionally

---

[88][1974] AC 727, at p. 757.
[89]*Ibid.* at p. 758.
[90]*Corey v. New York Stock Exchange* 691 F. 2d. 1205. The court said: "Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusionary. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association." (at p. 1211).
[91]80 US (13 Wall) 335, 20 L.Ed. 646 (1872).
[92]*Ibid.* at pp. 649-650.
[93]*Gahn v. International Union Ladies' Garment Workers Union* 311 F. 2d. 113, 114-115 (3rd Cir. 1962).

judicial job; therefore, they are protected from civil suit under the doctrine of arbitral immunity.[94]

In accordance with these judgments delivered by the courts, it can be concluded that arbitrators' immunity has been granted by means of case law or, indeed, by legislation. Because of the involvement of the state's powers on this matter, the judicial immunity is granted to arbitrators regardless of the parties' agreement. Furthermore, due to the considerations of general public interest and the welfare of the arbitrators as quasi-judicial officers, a negative answer can be provided to the questions whether the arbitrator's immunity can be contracted out of the arbitration agreement (under the contractual theory) and whether an arbitration agreement which expressly excludes the arbitrator's immunity is valid. In addition to the criticisms of the agent theory discussed above, this is another example of the deficiencies of the contractual theory.

Although the contractualists intend to create a more liberal arbitration framework by reducing the significance of the judicial elements of arbitration, their statement that arbitral awards should be enforced as contracts in any states attracts some doubt. First, not every contract can be enforced in any country. The court which is asked to enforce a contract usually checks whether it has jurisdiction over the case or whether such an enforcement would contradict the mandatory rules or public policy of the country before enforcing the contract. Secondly, this statement ignores the existing judicial review system in international commercial arbitration. Within the present arbitration framework, as discussed in section on the jurisdictional theory, not only the courts of the place of arbitration but also those where the recognition or enforcement of the award is sought can exercise their supervisory powers to determine the validity

[94]See *Hoosack Tunnel, Dock and Elevator Co. v. O'Brien* 137 Mass 424, 426 (1984).

of the arbitral awards. In fact, apart from the Belgian courts,[95] most national courts do exercise a supervisory power to ensure that no ground listed in Article V of the New York Convention exists in the awards submitted to them before granting recognition or enforcement.

However, the next question is what is the basis of the recognition or enforcement of arbitral awards if this is not done on a contractual basis? In the opinion of the present writer, it is more logical to hold that arbitral awards are enforced on the basis of public interest and the obligation imposed upon the signatory countries of the New York Convention. In the case of convention awards,[96] the courts of the signatory countries are obliged to recognise or enforce awards made in other signatory countries providing no ground listed in Article V of the New York Convention is established. In the case of non-conventional awards, the basis for a court to enforce a foreign award can be said to be public interest. This interest may include the public demand for an alternative way of resolving disputes, popularity of arbitration in the international trade community or the intention to reduce the caseload of the national courts. Following this argument, it is illogical to conclude that an award is or should be regarded as a contract between the parties.

The arguments surrounding the agent theory also extend to the issue of the nature of arbitral awards. Based on the agent theory, Merlin and Foelix maintain that an arbitral award is a contract. Under the agent theory, arbitral awards are regarded as contracts made by the arbitrators who act as agents of the parties. As a result of this principal and agent relationship, the contract made by the agents, that is, the arbitral award, has a binding effect on the principals, that is, the parties. The parties have to accept the arbitrators' award as "having binding contractual force and to voluntarily give effect to

[95]In cases where one or both of the parties to the awards are non-Belgians.
[96]A conventional award means an award made within the territory of a signatory country of the New York Convention 1958.

it."[97] Because of its contractual nature, an arbitral award should be enforced anywhere in the world. As Merlin maintains:

> "An arbitral decision rendered in a foreign country, is it anything other than a contract? Is it not the consequence of the agreement to arbitrate, as a result of which the arbitrators have rendered it? Is it not tied essentially to this arbitration agreement? Does it not form with this arbitration agreement a single entity? What would it be without this arbitration agreement? It would only be a useless piece of paper, it would be nothing. It is the arbitration agreement that gives it its existence; it is from the arbitration agreement that it derives all its substance; it has, then, like the arbitration agreement, the character of a contract; and the precise truth is that it is only the performance of the mandate that the parties have entrusted to the arbitrators; it is even, to put it precisely, only an agreement to which the parties have bound themselves by the hands of the latter (the arbitrators)."[98]

Merlin also contends that no question of territoriality will arise and the awards shall be recognised and enforced as contracts in any national court because no state power and authority is involved in the decision-making procedures. His argument has had certain influence on the development of the French and English arbitration laws. For instance, in 1937, the French *Cour de Cassation* ruled that the enforcement procedures for the arbitral awards could be less cumbersome than those for a foreign judgment, because "... arbitral awards, which have, as their basis, an arbitration agreement, form one entity with it and share its contractual character."[99] In a passage in *Vynior's* case, the Chief Justice (Coke) stated that the arbitrator's power and authority may be revoked like a number of engagements, such as making a letter of attorney to make livery or assign auditors to take an account, or submitting to an arbitration, and so on.[100]

---

[97]Lew, *Applicable Law*, (1978) at p. 54.

[98]Merlin, *Recueil Alphabétique de Questions de Droit* (4th ed.) Tarlier Brussels 1829 Vol. 9 at p. 144; translation from Samuel, *Jurisdictional Problems*, (1989) at p. 34.

[99]The *Roses* case, 27 July 1937 [1938] I *Dalloz* 25. The court held that the awards can be enforced by the President of the Tribunal Civil; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 36.

[100]8 Co. Rep. 81b at 82 a (1609). See Samuel, *Jurisdictional Problems*, (1989), at p. 36.

However, Balladore-Pallieri, Bernard and Klein have tried to challenge Merlin's argument that an award is a contract made by the parties, acting through their agents (the arbitrators). To Balladore-Pallieri, fitting arbitral awards into any particular juridical category is not entirely necessary.[101] However, Bernard and Klein believe that an arbitral award is a direct consequence of the contractual relationship between the parties and arbitrators and "the award is the work of the arbitrators".[102] Based on this agreement, the parties promise that the arbitral award will have a binding effect on them, and the national courts simply enforce the award as an obligation agreed by the parties.

Though, there has been disagreement on the issue of the agent theory, the contractual nature of arbitration and arbitral awards has never been disputed among the proponents of the contractual theory. As observed by Niboyet:

> "Arbitration awards have a contractual nature, as the arbitrators do not hold their power from the law or the judicial authorities, but from the parties' agreement (arbitration agreement, submission to arbitration). The arbitrator decides just as the parties could have done by agreement; [the parties] give the arbitrators a real mandate to decide in their place. The award is thus impregnated with a contractual character, and [according] to the law, it appears to be the work of the parties, it must have, as with all agreements, lawful effect, and [it must] possess the authority of a final judgement."[103]

With respect to the choice of the proper law, under the contractual theory the parties are offered an unlimited autonomy in choosing both the procedural law governing the arbitration and the proper law governing the main contract. The arbitrators are required to apply the law specified by the parties. As far as the issue of the choice of the procedural law is concerned, in order to fill the gap, the *lex fori* relating to arbitration proceedings is only applied in the absence of any express choice of law

---

[101]Balladore-Pallieri, G., "L'Arbitrage Privé dans les Rapports Internationaux", 51 *Recueil des Cour* 285, at p. 311, discussed in Samuel, *Jurisdictional Problems*, (1989), at p. 40.
[102]Klein, F-F., "Autonomie de la Volonté et Arbitrage" 47 *Rev.Crit.* 255 at p. 260 (1958), discussed in Samuel, *Jurisdictional Problems*, (1989), at pp. 43-44.
[103]Niboyet, *Traité*, para. 1284 at 136. It is translated in Lew, *Applicable Law*, (1978), at p. 54.

made by the parties. When a choice of the proper law issue arises, the arbitrators will have to look to the contract or the arbitration agreement to find the applicable substantive law according to the parties' expressed or implied wishes. Failing to find an express choice of law, they may have to follow the conflict of laws rules of the *lex fori* to determine the proper law. However, because of the contractual nature of arbitration, and distinct from the jurisdictional theory, the parties are thought to have freedom to choose any laws, including a-national principles, as the substantive law.

11.3 The hybrid theory

The jurisdictional theory and the contractual theory both have considerable support at opposite ends of the arbitration spectrum. However, to some jurists,[104] neither the jurisdictional theory nor the contractual theory provides a satisfactory and logical explanation of the modern framework of international commercial arbitration. Under these circumstances, as Dr. Lew pointed out, it is not surprising that a compromise theory with a mixed or hybrid character has developed.[105] The group of jurists which has developed the hybrid theory is convinced that the perfect operation of international commercial arbitration relies on both jurisdictional and contractual elements. The hybrid theory, in fact, is a compromise theory which is mixed between the contractual theory and jurisdictional theory.

The hybrid theory was created by Professor Surville,[106] and developed by Professor Sauser-Hall. Suggesting that international commercial arbitration is a mechanism with a dual character, Professor Sauser-Hall maintained, on the one hand that a contractual

---

[104]For example, Surville, F. and Sauser-Hall. For Surville, see Surville, F. and Arthuys, F. *Cours Elémentaire de Droit International Privé* (7th ed.) 1925 pp. 634-635; discussed in Samuel, *Jurisdictional Problems*, (1989), at p. 60.

[105]Lew, *Applicable Law*, (1978), at p. 57.

[106]For Surville, see footnote 104. This theory was developed by Professor Sauser-Hall in 1952, in "L'arbitrage en Droit International Privé", (1952) 44-I *Ann.Inst.Dr.Intern.* 469, and (1957) 47-II *Ann.Inst.Dr.Intern.* 394; see Lew, *Applicable Law*, (1978), at p. 57.

element in arbitration is reflected in the argument that arbitration has its origins in a private contract, where the parties have the power to choose the arbitrators and the rules to govern the arbitration procedures and substantive matters. On the other hand, he agreed with the jurisdictional theory that an arbitration has to be conducted within national legal regimes in order to determine powers of the parties, the validity of the arbitration agreement and the enforceability of the awards.

Accordingly, arbitration has been defined as "a mixed juridical institution, *sui generis*, which has its origin in the [parties'] agreement and draws its jurisdictional effects from the civil law."[107] In short, arbitration has a jurisdictional nature involving the application of the rules of procedure while it derives its effectiveness from the arbitration agreement between the parties.[108] Professor Sauser-Hall's argument is accepted by some practitioners, such as Messrs Redfern and Hunter, who expressly state:

> "International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognise and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law."[109]

In accordance with the hybrid theory, on the one hand the parties' freedom to contract an arbitration agreement, select arbitrators and choose the governing laws is based on the contractual nature of arbitration. On the other hand, the jurisdictional character of arbitration requires the issues relating to arbitral proceedings and the validity of arbitration agreements to be subject to the mandatory rules and public policy of the *lex*

---

[107](1957) 47-II *Ann.Inst.Dr.Intern.* 394 at pp. 398-399; cited in Lew, *Applicable Law*, (1978), at p. 57.

[108]Sauser-Hall, G., "L'arbitrage en Droit International Privé", (1952) 44-I, *Ann.Inst.Dr.Intern.* 469 at p. 471; discussed in Sanders, "Trends in the Field of International Commercial Arbitration", (1975) II *Recueil Des Cours* 233-234.

[109]Redfern and Hunter, *International Commercial Arbitration*, (2nd ed. 1991), at p. 8.

fori. Also, in relation to the recognition or enforcement of arbitral awards, the validity of arbitral awards will be scrutinised according to the mandatory rules and public policy of the country in which the recognition or enforcement is sought.

Robert Hunter also suggests that it is inappropriate to deny the dual character of arbitration:

> "the arbiter is required to decide the whole matters submitted to him or her by means of a 'decree arbitral' or 'award', and in so doing must not merely adhere to some rule, principle, criterion or standard; he or she must not contravene the law. Though the power of the arbiters over the submitters is based on contract, there is thus a jurisdictional as well as a contractual element in arbitration."[110]

The fundamental dual character of arbitration is also stressed by Ancel, who believes that the dual nature of arbitration is a concept "at the same time both contractual, because of its origin (the agreement binding the parties) and jurisdictional, because of the way in which it is expressed (arbitral award, decision on jurisdictional issues and decision by private judicial authority)."[111]

Professor Sanders also believes that the hybrid theory appears to be more complete than the contractual or jurisdictional theories to explain the issues arising from arbitration. He maintains that it would be inadequate if the emphasis was only based on one element of arbitration, either contractual or jurisdictional, because:

> "On the one hand arbitration must be based on an agreement of the parties to arbitrate; no arbitration can take place when there is not valid agreement of the parties to submit their difference to arbitration. If emphasis is laid upon this starting point and the line is drawn further, covering as well arbitral procedure and the award, it leads to the contractual theory on the nature of arbitration. On the other hand emphasis may be put upon the quasi-judicial character of arbitration. arbitration is a judicial process. the arbitrators, once appointed, act as judges. Their function is to give a final decision on the differences submitted to them. their decision has, in principle, the same effects as a judgement of a court. The dualistic character of arbitration has lead to the

---

[110]Hunter, *The Law of Arbitration in Scotland*, (1987), at p. 3.

[111]Ancel, "French Judicial Attitudes towards International Arbitration", (1993) 9(2) *Arbitration Int.* 121-129, at p. 121.

> intermediary view taken by those who adhere to what may be called the mixed arbitration theory: the character of arbitrator is influenced both by its contractual origin and by the judicial process it involves."[112]

Supporting the dual character of arbitration, Jean Robert points out a close link between the arbitration procedures and the forum of arbitration. He explains that the constitution of arbitration and the powers of the arbitrator are based on the parties' agreement while the validity of the agreement and enforcement of awards have to be decided in conformity with public policy or mandatory rules of the relevant laws, for example, the *lex fori* and the law of the country where the enforcement is sought.[113]

Under the hybrid theory, the relationship between the arbitrators and the parties is regarded as contractual in nature. This contractual nature reflects the arbitration agreement made between the parties. Under the arbitration agreement, the parties submit their disputes to arbitration and select the arbitrators who are regarded as suitable to resolve the disputes between them. As a result, arbitrators obtain their powers from the parties' authorisation and they are allowed to act on behalf of the parties within the scope of authorisation. Nevertheless, unlike the contractual theory, the extent of the arbitrator's power is subject to the scrutiny of the mandatory rules of the *lex fori* and the public policy rules of the enforcing states. As far as the nature of the arbitral awards is concerned, distinct from both the jurisdictional and contractual theories, the hybrid theory defines the nature of arbitral awards as half way between a judgment and a contract.[114]

---

[112]Sanders, "Trends in the Field of International Commercial Arbitration", (1975) II *Rec.des Cours* 233-234.

[113]Robert, "De la Place de la Loi dans L'Arbitrage", discussed in Sanders, (ed.) *International Arbitration: Liber Amicorum for Martin Domke*, (1967), 157, at pp. 227-229, and Samuel, *Jurisdictional Problems*, (1989), at p. 62.

[114]Surville, "Jurisprudence Française en Matière de Droit International", (1990) 29 *Revue Critique de Législation et de Jurisprudence*, 129 at p. 148; see also, Surville, F., & Arthuys, F., *Cours Elèmentaire de Droit International Privé*, (7th ed. 1925) at pp. 634-635.

Similar to the jurisdictional theory, the hybrid theory recognises the significance of the supervisory powers of the national courts of the place of arbitration and the enforcing states. It maintains that, in the absence of any express agreement between the parties, the law of the seat will be applied to govern the arbitration. Arbitrators are required to decide the proper law of the contract in accordance with the conflict of laws rules of the *lex fori*. In other words, arbitrators have to apply the law expressly chosen by the parties to the dispute; however, in the case where no expressed choice of law can be found, they have to resort to the conflict of laws rules of the place of arbitration in order to decide the law governing the substantive issues.[115] The jurisdictional nature has a stronger influence of the choice of the proper law. Since the conflict of laws rules of the *lex fori* are important in deciding the proper law of the contract under the hybrid theory, therefore, the validity of a choice of a-national principles and the application of a-national principles as the proper law of the contract will have to be decided by the mandatory rules of the *lex fori* and those of the countries where the recognition or enforcement is sought.

Although the hybrid theory receives support from both academics and practitioners, like other theories, it has still been criticised. One criticism is in relation to the inadequacy of the separation of the contractual and jurisdictional elements. The critics agree with Professor Sauser-Hall's arguments that both jurisdictional and contractual elements are found in arbitration, that an arbitration is originated in a private agreement, and that the place of arbitration may have a legitimate interest in controlling arbitration held in its territory. Nevertheless, they also point out that Professor Sauser-Hall never specifies the scope of both elements. As a result of this failure, in their opinion, the hybrid theory cannot be used to fill gaps existing in arbitration law and provide suggestions to reform arbitration laws.[116]

---

[115]Lew, *Applicable Law*, (1978), at p. 58.

[116]Bernard, *L'Arbitrage Volontaire en Droit Privé*, (1937) at p. 284; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 63.

Secondly, Professor Sauser-Hall's ignorance of the importance of other possible relevant applicable laws is also criticised. Professor Sauser-Hall only stresses the importance of the *lex fori*. He points out that the arbitration proceedings are regulated in accordance with the parties' agreement, at least to the extent allowed by the law of the place of arbitration. He maintains that it is the arbitrator's responsibility to reconcile the difference between the parties' wishes and the *lex fori*. Nevertheless, he ignores the fact that the *lex fori* may not be the only law regulating arbitration procedures and the validity of arbitral awards. In fact, the laws which can influence the outcome of arbitration include the law of the place where the arbitration agreement is made, the law of the place where the contract is carried out, the law of the parties' domiciles and the law of the place where the recognition or enforcement is sought. The validity of an award made without thoroughly taking these possible applicable laws into account is likely to be questioned in proceedings for setting aside the award and when recognition or enforcement is sought.

Over and above the criticisms already outlined, the present writer would add two further criticisms of the hybrid theory that are worthwhile discussing. One concerns the procedures to choose the proper law. The other concerns the origin of arbitration. As far as the former issue is concerned, in accordance with the hybrid theory, arbitrators are required to respect and apply the law chosen by the parties to the extent allowed by the *lex fori*. In the absence of such a choice, the arbitrators will resort directly to the conflict of laws rules of the *lex fori* to determine the proper law of the contract. The question which has to be raised is whether, within the present arbitration framework, the *lex fori* and the conflict of laws rules of the place of arbitration have the same significance in the choice of law procedures.

As far as the importance of the *lex fori* is concerned, some major arbitration countries, such as France, influenced by the delocalisation theory, no longer require the compulsory application of the mandatory rules and public policy of the *lex fori* in international commercial arbitration. With regard to the application of conflict of laws rules of the place of arbitration, observations from some recent international arbitral awards and the reform of national arbitration laws indicate that the significance of conflict of laws rules seems to have been reduced to a minimum. According to the new trend, it is no longer compulsory for the arbitrators to decide the proper law by following the traditional three steps stipulated in some conflict of laws rules. In a case where no proper law is chosen, arbitrators are allowed to choose the law they deem appropriate or resort to a-national principles to decide the substantive disputes. This change can be observed in some recently reformed arbitration laws where the term "according to the private international law" has been replaced by "according to the rules the arbitrator deems appropriate." For instance, the French Code of Civil Procedure 1981 stipulates: "The arbitrators shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules he deems appropriate."[117]

With respect to the origin of arbitration, the hybrid theory follows the arguments set by the contractual theory and maintains that an arbitration has its origin in a private contract, that is, the arbitration agreement between the parties. However, in the present writer's opinion, it is a fallacious argument. Two reasons for this will be given in the following paragraphs.

First of all, instead of being the origin of arbitration, an arbitration agreement made between the parties is simply one of the conditions which may have to be fulfilled in

[117]Article 1496 of the New French Code of Civil Procedure.

order to start an arbitration.[118] For instance, as argued in the previous section,[119] the issues of arbitrability and compulsory arbitrations rebut the argument that an arbitration agreement is the origin of arbitration. The real origin of arbitration is the state's power that allows private parties to submit certain kinds of disputes to arbitration, since any agreements to submit the disputes to arbitration would be invalid without permission of the states. Based on this argument, in the present writer's opinion, arbitration does not owe its origin to the parties' arbitration agreement, but to the state's authorisation.

The second criticism is that the hybrid theory fails to explain the case of compulsory arbitration when it expresses that an arbitration has its origin in a private contract between the parties. It is a similar mistake to the one observed in the discussion of contractual theory in the last section. Compulsory arbitration is designed, on the grounds of state interest and of reducing the court's caseload, to have certain fields of legal disputes compulsorily submitted to arbitration. Accordingly, compulsory arbitration requiring no consent of the parties originates from the power of states.[120] Therefore, the statement that an arbitration has its origin in the private contract can be rebutted in the case of compulsory arbitration.

Although the hybrid theory intends to encompass both the jurisdictional and contractual characters of international commercial arbitration, it is criticised over the lack of clarity in distinguishing between the jurisdictional and contractual elements, the undue emphasis on the *lex fori* and national conflict of laws rules in relation to the choice of law process and its support for the contract-based theory of the origin of arbitration. Therefore, despite the effort to reconcile the jurisdictional and contractual

---

[118]Compulsory arbitration is the exception.
[119]For details, see the section concerning the criticisms of the jurisdictional theory in Chapter 12.
[120]A detailed discussion is presented in the last section concerning the contractual theory.

theories, the hybrid theory still fails to cover every aspect of international commercial arbitration.

11.4 The autonomous theory

Instead of trying to define arbitration within the scale of the spectrum between the jurisdictional and contractual theories, Rubellin-Devichi looked into the practical aspects of arbitration and developed an autonomous theory. Believing that the merit of international commercial arbitration was the speedy and flexible character of the proceedings, she argued that an appropriate theory should be established by examining the use and purpose of arbitration. With an intention to create a friendly atmosphere for arbitration in the international commercial community, Rubellin-Devichi argued that the autonomous character of international commercial arbitration should be recognised.[121] She rejected the traditional jurisdictional and contractual theories on the grounds that both theories failed to correspond with reality and contradicted each other. She also rejected the hybrid theory because of its indefinite scope of application.

Instead of following the traditional debates over the jurisdictional and contractual characters of arbitration, Rubellin-Devichi maintained that the real character of arbitration had to be decided on the basis of its use and purpose by placing arbitration on a "supra-national" level and recognising its autonomous nature. Having studied the social and economic demands for international commercial arbitration, she suggests that "In order to allow arbitration to enjoy the expansion it deserves, while all along

---

[121] *L'arbitrage: Nature Juridique, Droit Interne et Droit International Privé*; see Lew, *Applicable Law*, (1978), at pp. 59-61.

keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual, nor jurisdictional, nor hybrid, but autonomous."[122]

Rubellin-Devichi did not argue about the dual nature of arbitration, but she disagreed with the efforts involved in trying to distinguish the jurisdictional and contractual characters of arbitration. In her opinion, it is difficult or even impossible to draw a line between the jurisdictional and contractual features of arbitration. An undesirable distortion of the development of international commercial arbitration may be caused by insisting on this kind of segregation. She did not classify arbitration as purely contractual or jurisdictional because both characters have been "so inextricably intertwined that they have become impossible to separate."[123] As she stated:

> "It is out of the question to apply the law of contract to the arbitral agreement and that relating to judgements to the award. The award is not a judgement and the arbitral agreement is not a contract like any other."[124]

Moreover,

> "The question is to know whether the arbitration does not extend beyond its two components to establish an autonomous institution, the nature of which should not be defined by reference to the contract or to jurisdiction, but whose legal authority is to be justified both by its purpose and by the guarantee necessary for those parties who do not bring their disputes before the official courts."[125]

She also believed that the existence and continuing development of international commercial arbitration corresponded with the demands from the international trade community. Business people have realised that arbitration meets their demands for a more flexible and easily-controlled method to settle the disputes between them. In order to satisfy the development and expansion of the arbitration industry, she argued

---

[122]Rubellin-Devichi, *L'arbitrag: Nature Juridique: Droit Interne et Droit International Privé, Librairie Generale de Droit et de Jurisprudence*, Paris (1965) at p. 365; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 67.

[123]*Ibid.* Rubellin-Devichi, at p. 363; cited from Lew, *Applicable Law*, (1978), at p. 60.

[124]*Ibid.* Rubellin-Devichi, at p. 17; translation from Samuel, *Jurisdictional Problems*, (1989), at p. 68.

[125]*Ibid.* at p. 59.

that complete party autonomy should be offered to the parties. In accordance with this idea, parties enjoy the full autonomy in deciding the arbitration procedures, such as the law governing the procedural matters and the time and place of arbitration as well as the ability to choose the law to govern the substantive matters.

Furthermore, Rubellin-Devichi maintained that, based on the autonomous theory, arbitration agreements and arbitral awards were enforceable in any country. She also saw the necessity of having an international dispute settlement institution established in order to provide perfectly functional arbitrations for the international business community. Therefore, she concluded that "only an original system, free from both the contractual and jurisdictional notions, would permit the necessary speed and guarantees which the parties legally claim to be brought together."[126]

While acknowledging full party autonomy in determining every detail of arbitration, the proponents of the autonomous theory deny the controlling or supervisory powers of the *lex fori* over arbitration. They invoke the idea of delocalisation theory and the idea of a supra-national arbitration and this can be observed in the discussion of the validity of arbitration agreements and arbitral awards and in choice of the proper law. With respect to the issue of the validity of arbitration agreements and arbitral awards, in accordance with the delocalisation theory, the proponents of the autonomous theory maintain that an arbitration should be free from restraints imposed by the laws of the relevant states. They also argue that the national laws of the place of arbitration or the place where the recognition or enforcement is sought should not have a supervisory role to play in an arbitration. Furthermore, because of the parties' wishes to arbitrate and the supra-national nature of arbitration, arbitration agreements and arbitral awards should be enforceable in any country.

---

[126]*Ibid.* at p. 60.

As far as the choice of the proper law is concerned, instead of confining arbitration within the national or international legal framework, the autonomous theory invokes the creation of a real "supra-national" law for international commercial arbitration. Under this truly supra-national arbitration, parties are entitled to choose any rules of law, a national system of law, international law, the new *lex mercatoria*, the general principles of law or even amiable composition to govern their relationship. Furthermore, they believe that the international commercial community should create its own law to be applied to international commercial disputes.

The idea of having total freedom in the choice of the proper law has been supported by Goldman,[127] Lando[128] and Lew.[129] The most revolutionary idea invoked by the autonomists is to create a supra-national character for international commercial arbitration. To achieve this goal, they maintain that business people should not confine themselves within a framework of national systems of law. The international business community is quite capable, they argue, of developing its own set of rules to resolve international commercial disputes. Based on this idea, it is argued that in international commercial arbitration the arbitrator's power to choose the proper law should not be restricted within the scope of national laws. They should be free to decide the dispute on the basis of either a municipal system of law or the general principles of international law, custom, usages of trade, good sense, fairness or justice.

Goldman supports the idea that the *lex mercatoria* is a legal system which is designed to govern certain types of international commercial dispute, while municipal law

---

[127]Goldman, "La Nouvelle Réglementation Française de L'arbitrage International", in *The Art of Arbitration: Liber Amicorum Pieter Sanders*, (1982), 153, 164; discussed in Berman, Harold and Sasser, Felix, "The New Law Merchant and the Old Sources, Content, and Legitimacy" in Carbonneau. (ed.) *Lex Mercatoria and Arbitration*, (1990) at p. 31.
[128]Lando, "The Lex Mercatoria in International Commercial Arbitration" 34 (1985) *I.C.L.Q.* 747.
[129]Lew, *Applicable Law*, (1978), at pp. 112-118.

appears to be insufficient in certain aspects.[130] Lew expresses his belief in the party autonomy doctrine and the existence of an autonomous legal order that does not belong to any particular national legal system.[131] Goldman's idea is also accepted by Lando. He is convinced that the *lex mercatoria*, instead of being made and promulgated by state authorities, is recognised as an autonomous system by the business community and by state authorities.[132] As Lando states:

> "By choosing the *lex mercatoria* the parties oust the technicalities of national legal systems and they avoid rules which are unfit for international contracts. Thus they escape peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws which are unknown in other countries such as the common law rules on consideration and privity of contract. Furthermore, those involved in the proceedings - parties, counsel and arbitrators - plead and argue on an equal footing, nobody has the advantage of having the case pleaded and decided by his own law and nobody has the handicap of seeing it governed by a foreign law."[133]

The application of a-national principles is also upheld by Mr. Tallon, who states that "The autonomy of the parties, so it is said, may produce a contract without law, a contract subject to *un droit anational*, so that arbitrators are not called upon to apply any fixed rules of a specific system of law, but may have resort to a law of their own creation."[134]

The autonomists are convinced that it is necessary for international commercial arbitration to be free from the controls of the *lex fori*. In addition, they believe that developing a set of laws to apply to international commercial relations is the only way to achieve the ideal of self-regulation for international commercial arbitration. Once these ideas are widely accepted, a truly international commercial arbitration will be

---

[130]Goldman, "La Nouvelle Réglementation Française de L'arbitrage International", in *The Art of Arbitration: Liber Amicorum Pieter Sanders*, 153, at p. 164 (1982), discussed in Berman, Harold and Sasser, Felix, "The New Law Merchant and the Old Sources, Content, and Legitimacy" in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, (1990), at p. 31.

[131]Lew, *Applicable Law*, (1978), at pp. 112-118.

[132]Lando, "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 *I.C.L.Q.* 747, at p. 752.

[133]*Ibid.* at 748.

[134]Tallon, in Schmitthoff (ed.) *The Sources of the Law of International Trade* (1964), at p. 157. It is also supported by Professor Goldman and Professor Fragistas.

created. A passage written by Luzzatto can serve as a concluding remark for the autonomy theory:

> "The detachment of the arbitral procedure from any municipal legal system and its organisation according to the free will of the parties to the dispute require therefore, that the operation of the said autonomy is recognised by means of an international convention, which also makes this aspect of international commercial arbitration relevant with regard to national laws. When the parties' autonomy becomes able to regulate the whole of the arbitration procedure without any connection with municipal laws, and when international regulations provide the parties with the machinery and facilities which may enable arbitration proceedings to fulfil their purposes without any resort to municipal courts, then it can be said that international commercial arbitration is recognised as such, in its truly international character, by the legal systems of the States which are parties to the convention."[135]

However, the autonomous theory was strongly criticized by Dr. Mann. He questioned whether such autonomous arbitration, which is not bound to any national legal system, is what every user of arbitration wants. Dr. Mann refused to accept the autonomous theory and stated that an arbitration has to be rooted in a national legal system. Furthermore, he suggested that most international traders would prefer to have their disputes resolved in accordance with municipal laws as opposed to transnational law.[136]

The other criticism of the autonomous theory is its lack of a clear framework. Although Rubellin-Devichi strongly believes that maximum freedom should be offered to the parties to an arbitration, she never provides clear guidance on how an autonomous arbitration should be conducted and to what extent the autonomy can be exercised if it conflicts with the public policy of certain states. Undeniably, compared with the previous three theories, the autonomous theory is very ambiguous in this aspect.

---

[135]Luzzatto, "International Commercial Arbitration and the Municipal Law of States", (1977) IV *Recueil Des Cour*, 52.
[136]Mann, "*Lex Facit Arbitrum*", reprinted in (1986) 2(3) *Arbitration Int.* 245-246.

In addition, the present writer would add three further criticisms of the autonomous theory. First, denying the jurisdictional element of arbitration, the autonomous theory over-stresses the significance of the arbitration agreement. As discussed in the previous sections, an arbitration agreement is not the only condition controlling the validity of arbitration. In fact, a successful arbitration relies on whether the arbitration agreement is valid and whether the arbitral award can be recognised and enforced in the place where the losing party has assets. To decide these matters, in most jurisdiction, the validity of the arbitration agreement and the arbitral award is subject to the scrutiny of a national law. This is a fact that the proponents of the autonomous theory tend to ignore. As discussed before, arbitrability and compulsory arbitration are two good examples to illustrate the deficiencies of this theory.

A second criticism of the autonomous theory is its invocation of world-wide recognition or enforcement of arbitral awards. A difficulty may arise in a case where the award is decided on the basis of the a-national principles, such as the general principles of law, the new *lex mercatoria* or amiable composition. Although the application of a-national principles in arbitration can be observed in some international arbitral awards and is accepted in some major arbitration countries, not every country accepts such an application. For instance, countries opposed to the application of the new *lex mercatoria* include Finland, Korea, Portugal and Thailand, while the application of amiable composition is not allowed in Bulgaria, Korea, Romania and Thailand.[137] In other words, the validity of awards made on the basis of a-national principles will be questioned in countries where such application is not allowed; as a result, recognition or enforcement of such awards will not be granted and, furthermore, the purpose of arbitration will also be frustrated.

---

[137]For details, see *The Handbook on International Commercial Arbitration*, (2nd ed. 1994).

A final criticism focuses on the idealistic feature of the autonomous theory. The autonomous theory is based on the ideal of a supra-national arbitration which is free from any municipal laws. However, one thing which cannot be denied is that, within the present international arbitration framework, arbitration is subject to the laws of a nation or several nations. For instance, before the arbitration proceeds, the validity of the arbitration agreement may have to be decided by the law the parties specified, the *lex fori*, or the law of the country where the agreement is made. During the arbitration, apart from the parties' choice of law, the procedures may have to be regulated by the *lex fori*. Besides, the law of the country where the recognition or enforcement is sought will have a supervisory power to decide the validity of the award at the stage when recognition or enforcement is sought. In fact, most countries do exercise certain levels of supervisory control over the arbitration procedures and arbitral awards.[138] Hence, it is illogical for the proponents of the autonomous theory to claim that every state has a responsibility to enforce every arbitration agreement and arbitral awards regardless of the individual state's interest.

In conclusion, compared to the jurisdictional, contractual and hybrid theories, the autonomous theory has gone beyond the reality of modern international commercial arbitration. In reality, the result of arbitration lies in the successful enforcement of an arbitral award. Within the present arbitration framework, the criteria determining whether the award can be enforced are controlled by the relevant national laws. The autonomous theory, instead of resolving the conflicts between the jurisdictional and contractual characters, simply tries to structure arbitration on an unrealistic basis. This may be the reason why the spirit of the autonomous theory has only been applied in Belgian arbitration law.

---

[138]Belgium may be the only exception.

Chapter Twelve

Summary and development

12.1 Summary

12.1.1 The changing face of arbitration

Arbitration, unlike national court systems, is a commercially-oriented product that flourishes on the basis of market forces. To avoid fading away, the popularity of this product depends on whether the demands of customers are satisfied. However, excessive interference exercised by state courts can result in dissatisfaction of the customers. Within the present framework of international commercial arbitration, states are the bodies which have significant power to determine how this market should be developed since they are regarded as having a proper and beneficial part to play in the grant of supervisory and supportive measures over arbitrations subject to their jurisdiction and the arbitral awards brought before them seeking recognition or enforcement. In sum, states are the most effective and direct controlling power to determine how arbitration should operate in an international market.

The controlling powers of states can be exercised at various stages of arbitration. For instance, arbitration can only be operated validly and legally on the basis of a state's endorsement. Accordingly, states have power to decide whether to recognise arbitration as a legal dispute settlement mechanism or not. Considering the public interest in having public money better spent on important projects and the demands for an alternative dispute settlement method outside national court systems in order to reduce the costs of litigation, states choose to recognise arbitration as a legal means of dispute settlement between private parties. Over and above recognising arbitration as an alternative dispute settlement mechanism, individual states have their own criteria to

decide which types of disputes between private parties can be submitted to arbitration and how the arbitration mechanism will operate, all based on their own traditions of arbitration and their own traditions of the relationship between arbitration and the courts. Furthermore, states have power to decide the validity of arbitral awards at the stage of recognition or enforcement.

With the increasing popularity of arbitration and the receptive environment created by both the international commercial world and national judicial systems, arbitration has had a fast growth and development fuelled by the expectations and the needs of the international business community. Since the 1960s, a number of famous international arbitration institutions have been widely used among international business people; as a result, it became apparent that many arbitrations conducted under international arbitration rules were not as closely linked to the place of arbitration as domestic arbitrations, either because of the nationality of the parties or the international nature of the transaction. States, considering their own particular interests and needs, also encouraged the private parties to use arbitration to resolve their disputes by enacting more liberal arbitration laws.

This favourable attitude towards arbitration is evident in the international community. As Sir Michael Kerr pointed out in one of his recent speeches: "What matters is that international arbitration has in general given rise to an internationally accepted harmonised procedural jurisprudence. ... It is establishing a generally accepted procedure for the resolution of disputes which cuts right across past and present barriers between different procedural philosophies and legal systems."[1] It is also apparent by the enactment of the UNCITRAL Model Law on International Commercial Arbitration.[2] As stated in a recent explanatory note from the UNCITRAL Secretariat:

---

[1] Kerr, *Concord and Conflict in International Arbitration* (The Keating Lecture), (1996), at p. 7.
[2] De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", 12 *Northwest.J..Int'l.Law & Bus.* 48 (1991), at p. 49.

> "As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court."[3]

At the national level, the trend to offer special freedom for international arbitration has recently been reinforced by court decisions in the United States, and by recent legislation in the UK, France, Belgium and other European countries. In accordance with these recent changes offered to arbitrations that involves foreign elements, the courts of the arbitral seat or the place where recognition or enforcement is sought will not usually examine international awards to the same standard as that applied to domestic disputes.

For instance, while the United States Supreme Court has reduced the restrictions on anti-trust and security disputes which are allowed to be submitted to international commercial arbitration,[4] England initiated the process of modernisation with the Arbitration Act 1979 which included "exclusion agreements" designed to eliminate most, but not all, judicial review of arbitration awards rendered in England and Wales in international disputes.[5] Furthermore, such process continues with the recent enactment of the Arbitration Act 1996 which comprises a thorough restatement and reform of the law.

In France, the amendment of the Decree 1981 provides arbitration with more freedom than ever before. It was intended to ensure that procedural regularity was respected;

---

[3]Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, UNCITRAL Model Arbitration Law 18 para. 14.

[4]*Scherk v. Alberto-Culver* 417 US 506 (1974), where the court said: A parochial refusal by the courts of one country to enforce an international arbitration agreement would frustrate these purposes 9 of orderliness and predictability in international business transactions.

[5]Section 3 of the Arbitration Act 1979 allows arbitrations to exclude appeals on points of law, see Schmitthoff "The United Kingdom Arbitration Act 1979", (1980) V *Y.B.C.A.* 231.

moreover, no matters of law or fact can be reviewed by the courts. This liberal approach was applied in the *Götaverken* case where the Paris Court of Appeal refused to hear a challenge of an ICC award between Swedish and Libyan parties[6] on the ground of lack of jurisdiction.

A clause excluding appeal or setting aside procedures also appears in recent Swiss legislation. Under the Swiss *Loi Federale sur le Droit International Privé,* parties to an international commercial arbitration are allowed to have a clause excluding any court challenges to awards when all parties involved are non-Swiss nationals.[7] In accordance with these amended statutes, parties to international arbitration in Switzerland will have a choice between three regimes: (1) broad review for arbitration, including violation of law or equity, under the International Arbitration Concordat,[8] (2) complete autonomy, if all parties are non-Swiss and have concluded an explicit agreement to exclude court challenge entirely[9] or (3) limited court review for matters of procedural fairness.[10]

Belgium has exceeded other countries in denying any right to have an award set aside, if no Belgian nationals are involved in the dispute.[11] This principle also applies to issues of fraud and excess of authority by arbitrators. As stipulated in the *Belgian Code Judiciare 1985*: "The Court of Belgium may be seized of a request for annulment only if at least one of the parties to the dispute decided by the arbitral award is either a

---

[6]*General National Maritime Transport Co. v. Société Götaverken Aidenal A.B.* Judgment February 21 1980, *d'Appel de Paris.*

[7]Article 192 of *Loi Federale sur le Droit International Privé,* 18 Dec. 1987.

[8]Art. 36 (f) of the *Concordat Suisse sur l'Arbitrage.*

[9]Art. 192.

[10]Art. 190(2).

[11]However, the nationality criteria applied in Article 1717 of the Belgian Code Judiciare 1985 causes controversy over whether this article is in breach of Article 7 of the Treaty of Rome which prohibits any discrimination on nationality. As it provides: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination."

physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a branch or any other establishment in Belgium."[12] This change in the Belgian law has caused one commentator to suggest that Belgium has become an arbitration paradise.[13]

In addition, for the last twenty years, a pattern of trade and investment between newly growing economic powers and the western countries has formed. With the fast growth of arbitration and new patterns of trade, demands for arbitration conducted outside the traditional European arbitration locations have been suggested. According to the economic and trade flows of international business in the past twenty years, some new areas of arbitration and economic growth can be seen in the non-traditional arbitration regions of the world, such as South East Asia and China, where modern arbitration has a comparatively short history. Compared to the traditional arbitration sites in the United States and Europe, these newly developing arbitration sites perceive arbitration in a more cautious way while trying to keep pace with their western counterparts.[14]

As well as European countries, Pacific Rim countries, such as China and Taiwan, have endeavoured to update their arbitration laws, especially those regulating international commercial arbitration. In Taiwan, the reform of arbitration law started in 1994 when the jurists realised that too many restrictions had been imposed on international commercial arbitration under the outdated Arbitration Act 1982 and that this reform might promote the Government's ambition to compete for the status of Asian Financial Centre. In China, the CIETAC Arbitration Rules 1994 and the Arbitration Law 1994 are the latest rules and legislation which incorporate the ideas of

---

[12]Article 1717 of the Belgian Code Judiciare, Law of March 27, 1985.
[13]Storme, "Belgium: A Paradise for International Commercial Arbitration", (1986) *Int'l Bus.Lawyer* 294-295.
[14]A detailed discussion can be found in Chapter Ten.

party autonomy, independence of arbitration agreements and "competence and competence". Though these two pieces of legislation do not adopt the same liberal attitude as those prevailing in the major western arbitration states, they are still regarded as a giant step forward compared to their predecessors.

12.1.2 Different levels of acceptance of the application of a-national principles among jurisdictions

In accordance with the examination carried out in Part One of this thesis, it can be seen that in a number of countries the traditional three-step choice of law rule in contract has been abandoned or modified into a two-step test. Moreover, observing the changes in French law, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law, Mayer commented: "more "advanced" arbitrators have, since the mid-1970s, adopted the so-called "direct approach", which consists of selecting the applicable law without applying the conflict of law rules of any specific State."[15] Two main factors contributed to this change: on the one hand, it has been caused by the ambiguous distinctions between the "implied choice" test and the "closest and most real relationship" test, while, on the other hand, it has been caused by the fact that, instead of following the three-step choice of law rules, international arbitrators frequently directly refer the choice of law issue to the "closest and most real relationship" test to ascertain the proper law of the contract.

While international commercial activities have increasingly been conducted on a global scale, international business people and their legal advisers have been conscious about the deficiencies of national laws to regulate international transactions. Consequently, as was outlined in Chapter Three, due to the changes in the choice of law rules and

---

[15]Mayer, "The Trend Towards Delocalisation in the Last 100 Years" in Hunter, Marriott and Veeder (eds.) *The Internationalisation of International Arbitration*, (1995), at p. 42 (hereinafter Hunter, Marriott and Veeder (eds.) *Internationalisation*.)

lack of confidence in national law regimes, a-national principles have become an alternative choice of law to govern the substantive disputes between the parties to an international commercial arbitration.

The application of a-national principles as the proper law of contract in international commercial arbitration was examined in Part Two of this thesis. In accordance with a number of international arbitration cases examined in this thesis it has been observed that the application of the general principles of law has been widely used to resolve disputes arising from state contracts. Also, the new *lex mercatoria* has frequently been chosen as the substantive law to govern major international contracts. In addition, outwith the application of strict laws, arbitrators have been requested to apply the notion of amiable composition to decide the cases according to their personal sense of fairness and equity.

However, as the extensive study conducted and reported in Part Three of this thesis suggests, the difference between the liberal attitudes of the western countries and the cautious and less liberal attitudes adopted by the newly emerged economic states has been evident in relation to the same issues in different aspects of arbitration, especially those concerning the extent of supervisory powers to be exercised by the national courts. The different levels of supervisory powers exercised by national courts also affects the issue of the choice of a-national principles as the proper law of the contract.

In fact, despite a world-wide effort in reforming arbitration laws, as outlined in this thesis a universal acceptance of the application of a-national principles has never been reached. On the one hand, some jurisdictions take the position that, on the basis of party autonomy, arbitrators should be permitted to apply the general principles of law, the new *lex mercatoria* or act as *amiable compositeurs* to decide the disputes, provided the rules applied are not inconsistent with public policy. On the other hand, some

countries have shown a less favourable attitude towards such an application. Consequently, the validity of international arbitral awards made on the basis of a-national principles depends on which countries where recognition or enforcement is sought. In other words, national courts which do not adopt the notion of a-national principles have the power to pronounce such awards void, even although such awards are valid under other jurisdictions.

Following on from the examination of the application of a-national principles in international arbitral awards, the different attitudes of the English, French, US, Hong Kong, Chinese, and Taiwanese courts towards the application of a-national principles were explored in Part Three. The levels of acceptance of the application of a-national principles in these countries vary. The courts of France, the United States and Hong Kong have little hesitation in accepting a-national awards made both in their territories and in foreign countries. In England, while the new *lex mercatoria* and the general principles of law in conjunction with a specific national law have eventually been recognised as a valid choice of law, the concept of amiable composition, which allows arbitrators to decide the dispute according to their personal sense of fairness, instead of under strict rules of law, was denied as a valid choice of the proper law until the enactment of the Arbitration Act 1996. In relation to the developing economic states, the concept of a-national principles appears to be uncertain in the courts of China and Taiwan, even though it has been suggested that this concept should be supported from a theoretical point of view.

Nevertheless, as a matter of fact, the concept of a-national principles exists and is widely applied in international arbitral awards. As far as the choice of a-national principles is concerned, as Professor Lalive correctly pointed out that:

> "it matters little to the modern commercial arbitrator ... that the principles he states or relies upon are, or are not, part and parcel of a "complete legal system". What matters is that an arbitral award, which is based on the *lex*

> *mercatoria* or transnational law, is in fact accepted by the parties themselves or, as the case may be, by national courts, as was the case in the famous *Norsolor* arbitration, which recognised the validity of a Geneva award based on such general principles."[16]

Nevertheless, the same evolution has not been observed in every country, and hesitations are perceivable. As for today, there is no unanimous position on this issue. As a result, a choice of a-national principles can be pronounced void on the ground that it contradicts the public policy of countries where the application of a-national principles is not recognised. As a result of this uncertainty, the purpose of arbitration to provide the parties with an enforceable award will also be frustrated when an award made on the basis of a-national law principles cannot be recognised or enforced in the jurisdictions where the concept of a-national principles is not acknowledged.

Following on from the discussion carried out in Chapter Eleven, it is evident that, no matter which theory is applied to an arbitration system, unless national courts accept the idea of truly international arbitration, any decisions made on a basis detached from national law regimes will be criticised and challenged on the grounds of mandatory rules and public policy restraints of national courts that exist within the present arbitration framework. This tension is also observed by Lord Mustill, who stated:

> "On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism, leans always against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering, and that the only court which possesses these powers is the municipal court of an individual state."[17]

Such diverse attitudes cause uncertainty in arbitral awards, since the application of a-national principles to determine the merits of the case has become a common practice

---

[16]Lalive, "The Internationalisation of International Arbitration: Some Observations" in Hunter, Marriott and Veeder (eds.) *Internationalisation* (1995), at p. 58.
[17]*Coppée-Lavalin v. Ken Ren Chemicals Ltd.* [1994] 2 All ER 449, at pp. 459-460.

in international commercial arbitration. As discussed in Part Two of this thesis, there is evidence that numerous arbitral awards have been decided on the basis of a-national principles, such as the general principles of laws, the new *lex mercatoria* or amiable composition. Such conflicts between the practice of arbitration and the negative attitude of some national courts has caused uncertainty over the validity of arbitral awards and the whole mechanism of international commercial arbitration. Moreover, unless the national courts of each state accept a-national principles as a valid choice of the proper law, the application of a-national principles will be attacked on the ground that it is contrary to mandatory rules or public policy and awards made on that basis may be set aside or refused recognition or enforcement.

Given this apparent contradiction, does it mean that we have little choice but to wait for the results of the enforcement of such awards made on the basis of a-national principles? Or, can we take a positive step to examine whether the existing four theories illustrating international commercial arbitration are correctly structured in order to explain such awards in modern international commercial arbitration?

With the belief that the application of a-national principles is one of the keys which will lead us to truly international commercial arbitration, in this concluding chapter, the present writer will go beyond the present framework to see whether such a contradiction between practice and different national courts' attitudes towards the application of a-national principles can be settled by other means. Before doing so, whether the application of a-national principles in international arbitral awards satisfies the expectations of the parties and states will be examined. If it does, based on the conclusion in the previous chapter that the deficiencies of the four theories cannot accommodate and provide a satisfactory answer to the conflicts caused by the application of a-national principles, a more appropriate approach to illustrate the present framework of international commercial arbitration and the application of a-

national principles will be suggested. Finally, a more desirable working system will be recommended.

12.1.3 The application of a-national principles satisfies the expectations of the parties and states

The issue of whether the application of a-national principles as the proper law of the contract can satisfy the expectations of the parties and the states will be discussed from two aspects. First, the issue will be explored by looking into the parties' intention in having their dispute resolved by means of arbitration. Secondly, from the viewpoint of states, there will be a discussion of the issue of whether the application of a-national principles will frustrate the intention of the national judicial systems to have the caseloads reduced when arbitration is adopted as an alternative dispute settlement mechanism.

The traditional complicated court procedures have become increasingly undesirable among business people engaging in international commerce. In contrast, more and more business people conducting international commerce choose international commercial arbitration as an alternative dispute settlement mechanism. This may be due to its more predictable and speedy design, which meets the nature and needs of international business in a rapidly changing environment. Given the intention of avoiding complicated court procedures by submitting disputes to arbitration, it is not surprising to learn that some parties are reluctant to have their arbitration and disputes governed by national laws, especially when national laws are frequently criticised for their inadequacy in coping with the disputes arising from complicated international commerce.

For instance, in accordance with parties' explicit choice of a-national principles, arbitrators are required to apply a-national principles to decide the merits of the case, whereas, in the absence of parties' choice, arbitrators sometimes apply a-national principles on their own initiative, such as in the *TEXACO*[18] and *Norsolor* cases.[19] As the Governing Working Group of UNIDROIT pointed out: "there is a growing tendency to permit the parties to choose 'rules of law' other than national laws on which the arbitrators are to base their decisions."[20] With the intention of resolving disputes outside national law regimes, a-national principles, such as the new *lex mercatoria* or amiable composition, have become an alternative choice of the proper law regulating the disputes arising from international contracts.

As suggested by a number of scholars, a-national principles incorporate the most basic legal principles and notions which have been absorbed into the various legal systems, such as *bona fides, pacta sunt servanda, force majeure*, equity, and so on.[21] The main strength of a-national principles is their flexibility which allows them to change with the development of international commerce. The flexibility of a-national principles enables arbitrators to meet the expectations of the parties and apply the "most up to date" and "economically most efficient" rules to resolve the various disputes in international commerce.[22] For international business people who have lost confidence in national laws, a-national principles which appear to embody the most up-to-date international commercial laws seem to satisfy the parties' demands in having their disputes resolved outside the national law regime.

---

[18]*Texaco Overseas Petroleum Co. / California Asiatic Co. v. Government of the Libyan Arab Republic*, 17 *I.L.M.* 3 (1978) (Award on the merits, Jan. 19, 1977; R. Depury was the sole arbitrator).

[19]The decision of the Court of Appeal is discussed in (1986) XI *Y.B.C.A.* 484 and the decision of the Supreme Court of Austria is discussed in (1984) IX *Y.B.C.A.* 159.

[20]The Governing Working Group of UNIDROIT, *Principles of International Commercial Contracts*, (1994), at p. 3 (hereinafter UNIDROIT, *Principles*.)

[21] For a detailed list of principles, see Berger, *International Economic Arbitration*, Vol. 9 (1993) at pp. 543-553.

[22]*Ibid.* at p. 554.

Secondly, as discussed in Chapter Eleven, there are two main factors contributing to the rapid development of international commercial arbitration. One is the demands and needs of the international business community to have an alternative disputes-settlement mechanism established. The other is the wish of states to have the caseload of national courts reduced by encouraging international business people to submit their international commercial disputes to arbitration. While concluding that a-national principles are adequate to satisfy the parties' demands to have their disputes resolved outside the national law regime, a second question is whether such an application would frustrate the intention of national judicial systems to have heavy caseloads reduced by adopting arbitration as an alternative dispute-settlement mechanism.

In order to decide this issue, first, we can take advantage of a chart published by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration).[23] In accordance with the statistics in this chart, the average number of cases filed with the SCC every year has increased from 15 cases during the 1970s, to 35 cases during the 1980s and then to over 110 cases during the 1990s. From these figures, we can see that, in the 1990s, the caseload of the SCC has increased ten-fold since the 1970s. Similar figures in caseload growth have been claimed by other arbitration institutions, such as the ICC and the CIETAC. As pointed out in Part Two, arbitral awards made on the basis of a-national principles also contribute to these statistics. While more and more business people adopt arbitration as their dispute settlement mechanism, fewer cases will be submitted to courts. In other words, the heavy caseload of national courts will be reduced.

Secondly, one question which needs to be raised is whether the awards made on the basis of a-national principles but later submitted to the national courts by an unsatisfied party will distort the intention to reduce the court's workload. It is submitted here that

[23]SCC Arbitration: Facts and Figures, published in May 1996.

this will not be the case. Submitting disputes concerning the validity of the final arbitral awards made on the basis of a-national principles to the national courts only artificially increases the caseload. In most jurisdictions, the national court judges are only permitted to examine procedural matters in accordance with limited grounds, refusing recognition or enforcement of awards, set out in the arbitration laws. The substance or the merits of the case decided by arbitrators cannot be reviewed by the national courts. In other words, the national courts can only examine whether arbitrators have gone beyond their authority in apply a-national principles to the substantive issues of the case, or whether such an application is against the mandatory rules or public policy of the courts. Given this argument, the present writer would suggest that the intention to reduce the court's caseload by means of arbitration will not be distorted because the more time spent in arbitration the less time will be spent in court.

Finally, after recognising that the application of a-national principles can satisfy the parties' demands to have their disputes resolved, and that the awards made on such a basis will not increase the burdens on the national courts, it would be logical to conclude that both the needs and expectations of the parties and national judicial systems will not be distorted by the application of the a-national principles as the proper law of the contract in international commercial arbitration.

12.1.4 The failure of the existing theories in resolving the conflict between arbitration practice and reactions of national courts in relation to the application of a-national principles

In Chapter Eleven, the evaluation of the jurisdictional, contractual, hybrid and autonomous theories revealed both strengths and weaknesses in the interpretation of the operation of international commercial arbitration. Generally speaking, all the

theories fail to provide a satisfactory explanation covering all of the different aspects of the operation of international commercial arbitration.

The jurisdictional theory provides the most logical explanation on the issue of the arbitrator's immunity, powers, duties, public policy and the state control over arbitration. However, it is criticised in respect of its failure to respond to current developments and the need for a more liberal environment for international commercial arbitration, especially in terms of the delocalisation theory and the application of a-national principles as the proper law.

Contrary to the jurisdictional theory, the contractual theory proposes a comprehensive explanation of the contractual relationship between the parties and the arbitrators. However, because it overlooks the issues of arbitrability and compulsory arbitration, the contractual theory fails to observe the fact that an arbitration agreement is not the only basis on which one can have a valid arbitration. In addition, the contractual theory fails to provide a satisfactory explanation of the arbitrator's immunity, powers, duties and the state control of arbitration.

In an effort to reconcile the deficiencies of both the jurisdictional theory and the contractual theory, the hybrid theory was developed; however, the hybrid theory is criticised for the inadequacy of the separation of the contractual and jurisdictional elements and the over-emphasis on the importance of the *lex fori*. As with the first three theories, the autonomous theory is also criticised for its idealistic approach and the lack of a clear framework for the operation of international commercial arbitration.

As to the issue of the application of a-national principles, the autonomous theory supports unlimited freedom in the choice of substantive law. Nevertheless, with the

exception of Belgium,[24] in reality, no states have granted arbitration total freedom. Most states set up certain criteria to decide the validity of arbitral awards in order to safeguard their own judicial interests. For instance, both the contractual theory and the hybrid theory, on the one hand, uphold the concept of party autonomy which includes the choice of a-national principles, while on the other hand, they claim that any choices based on party autonomy cannot contradict the mandatory rules and public policy of the relevant countries.

In fact, no matter which theory both traditional arbitration countries and newly developing arbitration countries adopt, it is undeniable that the jurisdictional elements of arbitration play a significant role at different stages of arbitration procedures. As outlined above, national courts have the power to examine whether the arbitration subjected to their jurisdiction meets their standards of fairness and justice. If they fail to comply with such standards, the courts of the place of arbitration, with the exception of Belgium,[25] may at the party's request set aside the award. Alternatively, the enforcing courts may refuse to recognise or enforce the awards at the stage of recognition or enforcement. Such conflict and discord "become apparent and almost inevitable as soon as the process of international arbitration comes into contact with national legislation and national courts."[26] In other words, despite the parties' intention to avoid the national court system, the procedures involved in recognition or enforcement of arbitral awards will submit the awards to the scrutiny of a national regime[27] and, in the case of convention awards, Article V of the New York Convention.[28] In addition, similar criteria of scrutiny are also operated in the UNCITRAL Model Law countries.

---

[24]No appeal on international arbitral awards is allowed if the arbitration is held in Belgium between non-Belgian nationals.
[25]The liberal attitude held by the Belgian courts, in fact, creates a loophole for the arbitration mechanism since a non-Belgian unsatisfied party can go to other countries to challenge the awards.
[26]Kerr, *Concord and Conflict in International Arbitration* (The Keating Lecture), (1996), at p. 9.
[27]If the enforcement is sought in a non-signatory country of the New York Convention.
[28]If the enforcement is sought in a signatory country of the New York Convention.

The power of national courts to scrutinise the validity of arbitral awards also covers the issue of the application of a-national principles as the proper law of the contract. Influenced by the autonomous theory and the idea of liberating arbitration from the restraints of national laws, some arbitrators believe that national laws are inadequate to resolve the complicated disputes arising from international trade. As a result, instead of following the traditional choice of national law as the substantive law, arbitrators tend to decide disputes between the parties on the basis of a-national principles, either based on the parties' express choice or the arbitrators' own initiative.

Nevertheless, regardless of how liberal attitude arbitrators have on the subject of choice of law, an award made on the basis of a-national principles has to be examined under the relevant national laws, such as the *lex loci contractus*, the *lex fori* or the law of the country where the recognition or enforcement is sought. In accordance with the different court judgments examined in Part Three,[29] it is impractical to deny the fact that the validity of awards made on the basis of a-national principles will ultimately depend on whether the laws of the relevant countries allow such an application since national courts have the power to exercise supervisory control over arbitration held in their territories and to examine awards submitted to them. If such an application is not permitted, then the awards may be set aside or rendered unenforceable on the ground that such an application contradicts the mandatory rules or public policy of that country.

Under these circumstances, the status of an award made on the basis of a-national principles is in an uncertain position, since its validity depends on the *lex fori* and the law of the country where the winning party seeks recognition or enforcement. Moreover, the enforcing country will not be known until the winning party

[29]Chapters Seven, Eight, Nine and Ten.

commences his action to enforce the award. This situation may indirectly cause further uncertainty within the mechanism of international commercial arbitration.

While confirming that the validity of awards made on the basis of a-national principles exists in an uncertain state, since it depends on the *lex fori* or the law of the country where the winning party seeks recognition or enforcement, in order to resolve such conflicts it is necessary to decide whether during the arbitration procedures or at the stage of recognition or enforcement the supervisory powers of the national courts in relation to the application of a-national principles have caused unnecessary uncertainty.

In the opinion of the present writer, such uncertainty should never have developed, for the following reasons. First, by choosing arbitration and a-national principles as the proper law of the underlying contract, parties' expectations to have their business disputes resolved outside the national laws regime can be successfully achieved. Secondly, as pointed out in the last section, the application of a-national principles will not hinder the state's aim to reduce the workload of national courts, even when the issue of the validity of such awards are questioned in the courts. Finally, the purpose of arbitration, as a commercial service, will not be accomplished unless the expectations of the parties and the aims and interests of states are satisfied. Accordingly, since the demands of the parties and states can be satisfied, it can be concluded that the purpose of arbitration to have disputes resolved efficiently will not be frustrated by the application of a-national principles.

As indicated in Part Two, a-national principles are frequently applied in international commercial arbitration. However, due to the strong influence of the jurisdictional elements in arbitration, the application of a-national principles as the proper law of contract is deadlocked. In other words, despite the practice of deciding the substantive merits on the basis of a-national principles, the validity of the awards made on that

basis still depends on whether the countries where the arbitration is held or where recognition or enforcement is sought recognise and accept such an application. Under these circumstances, in order to resolve such a conflict, it will be necessary to develop a new approach which can accommodate the use of a-national principles in the present arbitration framework.

12.2 Development

12.2.1 A new approach

The aim of this part of the study is to search for a more logical approach which not only provides a satisfactory answer to various aspects of arbitration, but also corresponds better with the current developments in international commercial arbitration, with a special emphasis on the application of a-national principles.

From the discussion above, we have observed that the application of a-national principles does not appear to cause any damage to the interests of the parties and states since the aim of the parties to have their disputes resolved by an alternative dispute settlement mechanism and the states' intention to reduce the caseload in national courts can both be accommodated. Nevertheless, both the needs and expectations of the parties and national judicial systems can be distorted because of the different levels of supervisory powers exercised by national courts. As highlighted in this study, this is particularly relevant in cases where awards made on the basis of a-national principles can be overturned by the courts of some jurisdictions where the application of a-national principles is regarded as illegal or being contrary to public policy.

In view of this disagreement over the application of a-national principles between the arbitration practice and the judgments of national courts, it will be necessary to see whether the jurisdictional, contractual, hybrid and autonomous theories which are

conventionally used to illustrate the present arbitration framework are appropriately structured and can provide a solution. Nevertheless, as pointed out in Chapter Eleven and the preceding section of this chapter, none of the theories provide a satisfactory answer to this conflict which leads to the uncertainty in the arbitration mechanism generally and in arbitral awards, perhaps it is time for the states to reconsider the theoretical aspects of arbitration. Instead of arbitration continuing to tangle with the existing judicial systems, it is more logical for the states to consider a new approach which not only offers the states a chance to keep pace with the development of international commercial arbitration but also eliminates the blind spots caused by the application of the existing four theories.

In the view of the present writer, as the hybrid theory correctly points out, international commercial arbitration is a mechanism containing both contractual and jurisdictional elements. Different aspects of arbitration, such as the triangular relationship between parties, arbitrators and states, can only be satisfactorily explained by a theory that comprises both contractual and jurisdictional elements. However, the present writer disagrees with the argument made by the proponents of the hybrid theory that an arbitration agreement between the parties is the basis of arbitration, and holds the view that the jurisdictional elements constitute the most fundamental elements of international commercial arbitration. In other words, the contractual elements of arbitration only have a role to play within the limits of the jurisdictional elements, which are more compelling as the foundation of the arbitration framework. The details of this new approach will be suggested in the following paragraphs.

Recognising the supervisory powers of states

In accordance with the jurisdictional elements, the state's supervisory and controlling powers are recognised under the new approach. Primarily, a strong indication of the jurisdictional elements of arbitration can also be observed in the fact that international

commercial arbitration operates in different countries. As discussed above, the expectations of business people to have an alternative commercial dispute-settlement mechanism and the support of states are the main factors in the development of international commercial arbitration. Perceiving arbitration as a possible method to relieve the heavy caseload of national courts and to respond to the demands for an alternative mechanism from the international commercial community, states decide to support arbitration as an alternative means to settle disputes between the parties.

Furthermore, states have powers to regulate any activities, including arbitration, conducted within their boundaries. For instance, in relation to the issue of arbitrability, parties are only permitted to submit their disputes to arbitration to the extent the states allow. The states have power to control the duties and powers of arbitrators and how the arbitral procedures should be carried out. Furthermore, national courts have power to review the validity of the arbitral awards made or which seek recognition or enforcement in their jurisdiction.

The existence of an arbitration agreement should be defined as one of the conditions which may have to be fulfilled

As well as the other theories, party autonomy is also recognised under this new approach. Within the limits imposed by the states, the parties have freedom to decide for themselves how the arbitration should be carried out. As far as the status of arbitration agreements is concerned, the present writer is in partial agreement with the contractual elements suggested in the four theories discussed above. It is not disputed here that a valid arbitration agreement is a contract between parties wishing to have their disputes resolved by means of arbitration.

However, it is the present writer's firm belief that, instead of being interpreted as the origin of an arbitration as the four conventional theories suggest, an arbitration

agreement should be defined as merely one of the conditions which may have to be fulfilled to start arbitration procedures. This is because the jurisdictional power of states is the origin of arbitration. Without endorsement from states, the validity of an arbitration agreement is questionable. This point has been extensively explored in the discussion on the issues of arbitrability and compulsory arbitration in Chapter Eleven.[30]

Responding to the demands for truly international commercial arbitration

With the establishment of a judicial framework for arbitration, the third step is to look at the current development of international commercial arbitration. In general, resolving disputes outside the national court system and obtaining an enforceable arbitral award are the main aims of parties when they choose arbitration as an alternative dispute-settlement mechanism. In order to obtain a stake in the market that has developed in international commercial arbitration, states must respond to the demands of the customers. In other words, states should not only consistently remind themselves of the purpose of arbitration but also be aware of the development in the arbitration industry.

The current development in arbitration indicates an increasing demand for truly international commercial arbitration.[31] This demand can be observed from various aspects, such as the recent amendments in legislation, the application of a-national principles in international arbitral awards and the enactment of international arbitration rules. For instance, in order to compete with other countries in the arbitration market, a number of countries, such as France, England, Hong Kong, China and Taiwan, have loosened their controls over arbitration through the amendment of their arbitration laws in order to meet the needs of international commerce and investment. These

[30]See Chapter Eleven.

[31]Laurence, "International Ambition and National Restraints in ICC Arbitration", (1985) 1(1) *Arbitration Int.* 49, at p. 70; also see UNIDROIT, *Principles*, (1994), Preamble; and Kerr, *Concord and Conflict in International Arbitration* (The Keating Lecture), (1996).

changes correspond with Dr. Wetter's observation that a trend of globalisation has already been in process, as he stated:

> "Russia and the many emerging new nations which forms parts of the former USSR, judging from admittedly scant available indications, seem to continue to adhere to a policy of providing for international arbitral resolution of contractual dispute, as does China; it is believed that Japan is moving slowly in the same direction. Assuming that the business and legal community attitudes favouring the international arbitral process continue to prevail in the US and the traditional arbitral jurisdictions in Europe as well as the Eastern European States and that the nations in the current economic growth areas in South-East Asia will follow the same course, it is fairly safe to predict that the next decade will bring increasing globalisation."[32]

Apart from the amendments of national legislation, a liberal attitude is also observed in practice where the new *lex mercatoria* or amiable composition have been applied in international arbitration.[33] The creation of a group of rules on international commercial arbitration by the United Nations Commission on International Trade Law (the UNCITRAL) to harmonise and unify the law of international arbitration[34] is another attempt to eliminate the barriers to arbitration caused by the different levels of state controls and arbitration laws.

As well as the UNCITRAL Model law, the Governing Working Group of UNIDROIT has produced general rules for international commercial contracts, the UNIDROIT Principles of International Commercial Contracts. In the preamble of the Principles, it is suggested that the principles should be one of the sources when a-national principles, such as the general principles of law, the new *lex mercatoria* or amiable composition are chosen to decide the substance of the disputes. The application of the principles has been suggested in a survey conducted by the UNIDROIT Secretariat in September 1996. The survey indicates that 19.95% of the people replying to the

[32]Wetter, "The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years" in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), at p. 88.

[33]See Chapters Three, Four and Five.

[34]UNCITRAL adopted Arbitration Rules in 1976, Conciliation Rules in 1980, the Guideline for Administering Arbitration under the UNCITRAL Arbitration Rules in 1982 and Article 28 (1) of the Model Law on International Commercial Arbitration in 1985.

questionnaires have experience in applying the UNIDROIT Principles in arbitration proceedings.[35]

Support for international commercial arbitration can also be noted with "a worldwide tendency to limit the extent of judicial intervention in respect of arbitration, both during its course and after the making of an award, with a view to preserving the integrity of the arbitral process and the finality of the arbitral award."[36] Supporting evidence of this idea can be observed in legislations and in a number of cases. In respect of legislation, this idea has been embodied in the Swiss International Concordat, which only provides review for violation of public policy and the possibility of opting out of this limited review by means of an "exclusion agreement".[37] As well as this development in Switzerland, Belgium provides for no judicial review at all when no Belgian citizens are involved.

In England, Steyn J. expressed his support for arbitration in the case of *K/S A/S Bill Biakh v. Hyundai Co.*,[38] where the disputes arose from contracts for the construction of two vessels in Korea for Norwegian purchasers. He stated:

> "In the interests of expedition and finality of arbitration proceedings, it is of the first importance that judicial intrusion in the arbitral process should be kept to a minimum. A judicial power to correct during the course of the reference procedural rulings of an arbitrator which are within his jurisdiction is unknown in advanced arbitration systems, ... and the creation of such a power by judicial precedent in this case would constitute a most serious reproach to the ability of our system of arbitration to serve the needs of users of the arbitral process.[39]

---

[35]Bonell, *The UNIDROIT Principles in Practice: The Experience of the First Two Years*, (1997), at p. 35.
[36]Murray, "Letting Arbiters Get On with the Job", (1997) SLT 64, at pp. 65-66.
[37]Article 190(2) of PIL.
[38]*K/S A/S Bill Biakh v. Hyundai Co.* [1988] 1 Ll L R 187.
[39]*Ibid.* at p. 189.

A similar attitude was also noted in the judgment delivered by Lord Mustill in the *Ken Ren* case.[40] Lord Mustill dismissed the application for security for costs and believed that the foreign parties to a contract governed by a foreign law and entirely performed abroad had, by choosing an ICC arbitration, given an unmistakable signal of their intentions.[41] As he explained:

> "they (the parties) have signified that although the arbitration must perforce, be physically located somewhere, it is the invariable framework of the ICC rather than the diverse local laws and practices which is to form the context within which the dispute is resolved. I would go further, and assert that the choice of ICC arbitration is an indication that the parties are looking for a relationship which particular national courts which is less closely coupled than would otherwise be the case."[42]

Turning to Scotland, a recent judgment[43] of the Lord President (Hope) also delivered the similar message, as he said:

> "The guiding principle, ever since Regulation 25 of the Article of Regulation concerning the Session, dated 29 April 1695, was enacted three hundred years ago, is that the Court should detach itself as far as possible from the process of arbitration before a private arbiter. Throughout the development of the law of arbitration during the past three centuries the Court has been careful to insist that questions of fact and law and matters of procedure are for the arbiter alone and not for the Court. The aim has been to secure for the Arbiter's award under Scots law the conclusive finality which it was the object of the parties to confer upon it when they agreed in their contract to this procedure.[44]
>
> ...
>
> If Arbiters are to have the confidence which they require to simplify and accelerate procedure in such cases, they ought not to be exposed to the risk of challenge to their decisions by means of the cumbersome and time-consuming procedure of a stated case."[45]

States' supervisory powers shall be transferred to a well-designed supranational body

---

[40] *Coppée-Lavalin v. Ken Ren Chemicals Ltd.* [1994] 2 All ER 449. However, this was a minority judgment.
[41] *Ibid.* at p. 468.
[42] *Ibid.* at p. 469.
[43] *ERDC Construction Limited v. H. M. Love & Company and others* Court of Session, 26 July, 1996 (1997) SLT 175.
[44] *Ibid.* at p. 10.
[45] *Ibid.* at p. 11.

Although the demand for a truly international commercial arbitration has been noticed, the totally delocalised Belgian arbitration reform does not seem to receive full support from the arbitration community. As one commentator noted:

> "It has been rightly criticised, by pointing out that the victim of a serious irregularity has no opportunity to challenge the defective award, and is required, when he is the defendant, to defend against enforcement in every country in which he has substantial assets. The situation worsens when the victim of the irregularity is the claimant: the award which unjustly denies his claim stands forever, unless the claimant commences litigation and denies the award's *res judicata* effect when the defendant raises it as an exception."[46]

To remedy this defect, while stressing the jurisdictional elements of arbitration, in this new approach, the present writer would propose going one step further than the jurisdictional theory. That is, to have an ideal arbitration framework which corresponds with the fast development of arbitration and the existing level of judicial intervention, states must be prepared to give away the supervisory powers over arbitration to a well-designed supranational body while allowing the parties to submit their commercial disputes to a private judge, that is arbitrator.

On the first level of this new approach, states would recognise arbitration as a valid means of settling commercial disputes between parties outside of national court system. Secondly, recognising the autonomous jurisdiction of arbitral tribunals, states would uphold the binding force of arbitration agreements and arbitral awards; moreover, they would provide any necessary supportive measures the arbitrators may need during the arbitration procedure. Thirdly, to encourage more professionals to be arbitrators, states should offer them similar protections to those enjoyed by judges. This would include immunity and the power to conduct arbitration efficiently. Finally, on the ground of public policy, some duties should be imposed upon arbitrators, such

[46]Mayer, "The Trend Towards Delocalisation in the Last 100 Years" in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), at p. 45.

as due diligence and acting independently and impartially during arbitration procedures.

Furthermore, following the liberal trend observed in practice and recent national and international legislation and responding to the demands for a truly international arbitration framework, it is the present writer's opinion that it would be logical for states to convert their supervisory role to a supporting role by shifting the supervisory powers to a well-organised international establishment, which will be designed to have exclusive jurisdiction over arbitration in order to control the legality of arbitration procedures and arbitral awards. Ideally, after states have submitted their supervisory powers over arbitration to this supranational establishment, international commercial arbitration can be truly international and can be operated under the same rules throughout the trading world. Furthermore, within the limits of the international mandatory rules and public policy set by this institution, the parties' decision to submit their disputes to arbitration should be regarded as a contract which must be enforced.

Within this new framework, the present writer envisages that states shall ensure that all necessary supportive measures, such as interim measures of relief and compelling the attendance of witnesses, are quickly available during the arbitration procedures. Regarding disputes over the validity of arbitral awards, they shall be determined by this supranational establishment to ensure that no procedural irregularities occur during the proceedings. After the decisions on enforceability of arbitral awards have been handed down by this establishment, states shall have an obligation and common understanding to execute such decisions regarding persons and property within their territories.

The suggestion on validity of arbitral awards, to certain extent, corresponds with Judge Howard Holtzmann and Judge Stephen Schwebel's proposal for a "new

International Court of Arbitral Awards",[47] which is welcomed by Nariman,[48] Hunter,[49] H.E. Judge Ajibola,[50] and Professor van Houtte.[51] In their proposal, they proposed to create a new International Court of Arbitral Awards which is designed to remove the risks inherent in the present regime of the New York Convention by taking the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitral awards. Judge Holtzmann suggested that, by means of an international convention, "applications to set aside or enforce awards would be within the sole jurisdiction of the new international court,"[52] consequently, "execution of judgments of the new international court will not be subject to interference or delay by municipal courts."[53] Accordingly, each state that adheres to the new convention would have "their appropriate ministerial officials promptly execute judgments, or orders, of the new international court, just as those officials now execute decisions of the State's municipal courts."[54] If states failed to comply with their convention obligations, penalties will be imposed upon them by the international court.[55]

Although the scope of jurisdiction defined in Judge Holtzmann and Judge Schwebel's proposal differs from the new approach suggested by the present writer; the former invokes exclusive jurisdiction only over the questions of enforceability of arbitral

---

[47]H.E. Judge Howard M. Holtzmann "A Task for the 21 Century: Creating a New International Court for Resolving Disputes on Enforceability of Arbitral Awards", in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), 109-114; H.E. Judge Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Awards", in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), 115-123.

[48]Nariman, F.S. "Intervention" in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), at pp. 155-156.

[49]Hunter, Martin, "Intervention" in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), at pp. 157-158.

[50]H.E. Judge Ajibola, "Intervention" in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), at pp. 159-160.

[51]van Houtte, "Intervention" in *The Internationalisation of International Arbitration*, (1995), at pp. 161-163.

[52]H.E. Judge Howard M. Holtzmann "A Task for the 21 Century: Creating a New International Court for Resolving Disputes on Enforceability of Arbitral Awards", in *The Internationalisation of International Arbitration*, (1995), 109-114, at p. 112.

[53]*Ibid.* at p. 113.

[54]*Ibid.*

[55]Hunter, Martin, "Intervention" in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), at pp. 157-158, at p. 157.

awards, whereas the latter proposes not only exclusive jurisdiction over arbitration mechanism but also separation of arbitration and national court system, the present writer is in a total agreement with Judge Holtzmann and Judge Schwebel that such changes would facilitate international contract negotiations by removing a difficulty the parties often face in reaching agreement on the choice of the place of arbitration of any future disputes,[56] furthermore:

> "Such a court would promote uniform standards and predictability. Further, a new court would be better positioned to avoid the delays that are often experienced in crowded municipal courts where it can take years to reach a final judgment. And most significantly, such a court would ... facilitate international trade and investment by reducing the risks and uncertainties that business people fear when they must submit their affairs to the court of a foreign country."[57]

Allowing the application of a-national principles

As outlined above, the concept of party autonomy is adopted in this new approach. With respect to choice of law, parties have freedom to choose any national laws they desire to govern their disputes. Besides the choice of national laws, parties also have freedom to choose a-national principles as the proper law of their contract. Without any express choice, a-national principles may be applied to the merits of the dispute in order to fill the gap. This proposal is not a radical one, since the business and legal community of the United States and the traditional arbitral jurisdictions in Europe already follow the practice of applying a-national principles in cases involving international commercial arbitration. Furthermore, the research has also shown that the nations in the current economic growth areas in China and South-East Asia are moving slowly in the same direction.

---

[56]H.E. Judge Howard M. Holtzmann "A Task for the 21 Century: Creating a New International Court for Resolving Disputes on Enforceability of Arbitral Awards", in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), 109-114, at p. 112.
[57]*Ibid.* at p. 114.

For instance, recently, a friendly attitude towards the application of a-national principles was observed in the *Channel Tunnel* case in England,[58] where Lord Mustill did not explicitly object to the application of a-national principles contained in clause 67 of the contract between the parties. As he indicated:

> "I have no doubt that the dispute-resolution mechanisms of clause 67 were the subject of careful thought and negotiation. The parties chose an indeterminate 'law' to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants. This conspicuously neutral, 'anational' and extra judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture"[59]

With the endorsement by states of this new approach and of the status of a-national principles, the application of a-national principles to resolve the substantive disputes of the contract will be adopted world-wide. Based on this acceptance, the awards made under the supervision of this supra-national controlling body will be recognised and enforced world-wide.

However, one thing which needs to be borne in mind is that a number of states treat a-national principles as suspicious unknown norms because the content of the rules has never been specified. Therefore, the present writer does not deny that there may be many obstacles ahead for such an idea. This idea will not be fulfilled in the short term, nor will the elimination of the hostile attitude of states towards a-national principles be an easy task. In order to gain the total confidence of the states and achieve an absolute separation of arbitration from the present national judicial framework, it will be necessary to consider the possibility of developing well designed a-national principles to regulate international commercial activities (as suggested by the proponents of the autonomous theory).

---

[58]*Channel Tunnel Group Ltd. v. Balfour Beatty Ltd.* [1993] AC 334, 363; [1993] 2 WLR 262, 291.
[59]*Ibid.* at p. 291.

Regarding the unification process of a-national principles, as Mr. Graveson correctly pointed out that "What in substance is being unified is not law but various functions, purposes or policies and that law, as a secondary or auxiliary science, plays its essential and indispensable part in carrying out those policies on which unification has been agreed",[60] the present writer believes that a careful preparation on a comparative basis of legal principles is the key to achieve such a task. Fortunately, for international business people involved in the arbitration industry, the creation of the *UNIDROIT Principles of International Commercial Contracts* provides clear guidance for the parties who have agreed to have their contracts governed by a-national principles. As expressed in the Preamble of the Principles, the seven chapters set out in the Principles "may be applied when the parties have agreed that their contract be governed by 'general principles of law', the '*lex mercatoria*' or the like,"[61] since the principles are common to existing national legal systems and are adapted to the special requirements of international commercial transactions.[62] A reference to the Principles, a systematic and well-defined set of rules, can avoid, or at least considerably reduce, the uncertainty accompanying the use of a-national principles.[63]

12.2.2 Concerns in regard to the new approach

Throughout the development of arbitration over the past two centuries, the regulation of international commercial arbitration has been left entirely to national jurisdictions. Nowadays, however, with the development of travel, communications and the increasing complexity of international trade and commerce, domestically cultivated arbitration laws have shown their deficiencies in the regulation of international commercial arbitration. Perhaps it is time for us to stop pretending that the present

[60]Graveson, R.H., One Law - On Jurisprudence and the Unification of Law Vol. II (1977) at p. 215.
[61]UNIDROIT, *Principles*, (1994), Preamble.
[62]UNIDROIT, *Principles*, (1994), at p. 3.
[63]*Ibid.* at p. 4.

arbitration framework is completely satisfactory and turning a blind eye to the uncertainty and conflict that present exists. It is the present writer's firm belief that there is a need for an effective international regime that will not only unify the laws regulating international arbitration but also develop appropriate international rules for international commercial arbitration.

The new approach suggested in the last section has the aim of reconciling the different attitudes of states towards the many aspects of arbitration, with a special emphasis on the application of a-national principles as the proper law. It is inspired by the demand for a truly international commercial arbitration that has not, as yet, been discussed or accepted by any country. Nevertheless, as with most theories, there might be certain concerns with the new framework of international commercial arbitration outlined above. Criticisms may include idealism, the potential hostility of states, practicality, time scale and problems with diversity of culture. It is vital to meet head-on unjustified criticism to avoid it clouding the opportunity of developing a new approach.

Is the new approach too idealistic?

As with the autonomous theory, one of the concerns about the new approach is the idealistic character of the framework. Nevertheless, in the present writer's opinion, the criticisms of over idealism directed at the autonomous theory do not apply to the suggested new framework. Unlike the autonomous theory, which believes that the origin of arbitration is a contract, the new framework suggests that arbitration is based on jurisdictional elements. In fact, the new framework is neither against the *lex fori* nor disputes the state's supervisory power over arbitration procedures and arbitral awards. On the contrary, the new approach agrees with the significance of the jurisdictional elements of arbitration. One point distinguishing the new approach from the autonomous theory is its plea to states to submit their supervisory power to a well-

designed independent controlling body in order to facilitate a truly international arbitration framework. Therefore, the issue of idealism over alleged ignorance of the state's supervisory power does not apply to the new approach.

Furthermore, as discussed in the previous section, the new approach suggested by the present writer corresponds with Judge Holtzmann and Judge Schwebel's proposal of internationalisation of international commercial arbitration. Therefore, aiming to resolve the existing issues of arbitration and achieve "a truly universal system of international commercial justice",[64] the new approach which reflects the expectation and need of the arbitration community shall not be criticised as idealistic.

Potential resistance of states

The greatest threat to the opportunities presented by the new approach is the issue of whether states are willing to submit their existing powers to a central body. In this new framework, voluntary submission is the key to success, since this approach cannot get off the ground without the co-operation of the states. In order to avoid hostility, states have to be made aware of the needs and benefits of a truly international arbitration framework in the international commercial community.

An immediate question arising is how states can be persuaded to give up the supervisory powers over arbitration. Two steps can be undertaken. The first step is to persuade states that a total change of the present arbitration framework appears to be necessary. Secondly, states will have to be convinced that it is in their interests to adopt the new approach.

---

[64]H.E. Judge Howard M. Holtzmann "A Task for the 21 Century: Creating a New International Court for Resolving Disputes on Enforceability of Arbitral Awards", in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), 109-114, at p. 110.

In relation to the first step, the need for a total change of the present arbitration framework can be seen, on the one hand, from the deficiencies of the four theories in explaining the various aspects of arbitration, and on the other hand, from the appeal for a truly international commercial arbitration revealed in recent national legislative changes. While competing for the arbitration market and attempting to satisfy the demands of the international business community and the interests of states, many countries have followed a liberal trend which invokes the idea of internationalised arbitration to revise their arbitration laws. The intention to liberate and internationalise arbitration is evident, since no nation would knowingly enact legislation which would be detrimental to its own interests or to the interests of its nationals.

Another piece of supportive evidence of the need for a truly international commercial arbitration is the increasing application of a-national principles. The deficiencies of the four conventional theories become more obvious when they fail to explain the conflict between such applications and the state's jurisdictional power. In these circumstances, instead of staying in the present framework, it is in the state's interests to consider adopting a new approach which can provide a satisfactory solution to this conflict. In addition, in accordance with the current developments in relaxing arbitration legislation, delocalising arbitration and application of a-national principles as the substantive laws, a trend towards a truly international commercial arbitration has been obvious in the arbitration industry and states. It would be in the state's best interests to recognise such a trend as early as possible and reduce the restraints to a minimum level, and eventually to eliminate the excessive supervisory powers. By doing this they would achieve a leading role in designing the new arbitration framework and a reputation as a favourable place for arbitration. Once their reputation has been established, it will be easier for such states to gain leading positions in their regions; as a result, they may gain an advantage by founding regional headquarters of

arbitration centres. Furthermore, with this advantage, states may produce more revenue receipts.

Secondly, should we prove successful in persuading states that it is in their best interests to give up their supervisory powers, the next task is to identify what kind of mechanism should be substituted for the existing national framework and will be accepted by the practitioners and academics. After studying the criticisms of the theories discussed in the last chapter, in the opinion of the present writer the answer might lie in having a well-designed supervisory body which would be responsible for regulating both the procedural and the substantive aspects of arbitration. The existence of a supra-national controlling body can not only avoid conflicting decisions among different states but can also be identified as the exclusive forum for challenge.

Ideally, this organisation would be established under the supervision of an independent body which has an international role, such as the United Nations Economic and Social Council or the United Nations Commission on International Trade Law. The main remit of this body would be to create a well designed arbitration framework to convince the states to submit their supervisory powers to the organisation. Under this institution, different branches would also be founded on a regional basis. In order to achieve the goal of truly international commercial arbitration, instead of creating new sets of rules, based on the regions, the institutions would co-ordinate, harmonise and unify the existing national and international arbitration laws to regulate the issues arising from arbitration and international trade. Hopefully, with the realisation of the need for a truly international arbitration framework and the persuasion of a well designed central institution the states can be convinced that it is in their best interests to take part in organising and developing the new framework.

With the creation of this supra-national body, the interpretation of a-national principles will also be unified. The present situation, where laws are interpreted differently in each state, will be dramatically improved. Hopefully, with every effort made to create a trustworthy and effective arbitration framework, the states would be willing to submit their powers to this supervisory organisation.

When states transfer their supervisory powers to this body, international commercial arbitration would be completely separated from the national judicial systems. However, this does not mean that states simply pass the responsibility to the organisation and then stand by and make no further contribution themselves. As emphasised in the previous chapter, arbitration will be impractical without the support and co-operation of the states. Therefore, according to this framework, states will play a significant supporting role as enforcing bodies. Furthermore, under the new approach, the states would enforce valid awards made under the supervision of the central body which would be established with the states' support.

Achieving unification of law

Certainty of legal relations is an essential element in the commercial world, as elsewhere. However, within the present arbitration framework, the validity of arbitral awards exists in an uncertain position which undoubtedly results from the differences in municipal laws. Such uncertainty has deterred the development of both international commercial arbitration and international commerce. Consequently, in order to escape from the restrictions of municipal law, a growing trend of unifying international commercial practice with rules of law has been observed in the field of international commerce. Three main reasons have been highlighted by a commentator, they are:

> "1. Great differences in the various legal systems and national laws are, as such, a factor unfavourable to the existence of an international market.
> 2. Municipal laws are becoming inadequate for the problems of international law.

> 3. The Municipal courts which apply municipal systems of law are not suited to satisfy the needs of international business."[65]

In order to resolve the problems arising from the lack of reliable and uniform regulation in the arbitration mechanism, both academics and practitioners will need to invoke the idea of the unification of law in order to overcome the conflicts created by the divergence of national laws. In relation to the laws applying to international commercial arbitration, efforts have been made to unify both procedural and substantive rules of law. The unification of the procedural rules of law can be seen in the enactment of the UNCITRAL Arbitration Rules, the UNCITRAL Model Law and the New York Convention. The subject of substantive rules of law has been mainly explored in the ICC's *INCOTERMS*, the *Uniform Customs and Practice for Documentary Credits*, the *United Nations (Vienna) Convention on Contracts for the International Sale of Goods*" ("*CISG*") and the *UNIDROIT Principles of International Commercial Contracts* which incorporate the customary law merchant and the practice applied in international commerce.

As far as the procedural rules that would regulate arbitration operated under the supervision of the supra-national controlling body are concerned, under the new approach, instead of adding more sets of new rules to the market this supra-national body could adopt the UNCITRAL Arbitration Rules or the Model Law as the procedural law which will be applied to arbitration conducted under its supervision.

With respect to the issue of a-national principles which is examined in this thesis, where no express choice is made, the supra-national body would co-ordinate the existing sources which incorporate the customary law merchant and the practice

---

[65]Goldstajn, "International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law", in Schmitthoff, (ed.) *The Sources of the Law of International Trade - with Special Reference to East - West Trade*, (1964), at pp. 111-112.

applied in international commerce, such as the ICC's *INCOTERMS*, the *Uniform Customs and Practice for Documentary Credits*, the "*CISG*" and the *UNIDROIT Principles of International Commercial Contracts*. Then, the international legislators from the suggested supra-national body would produce unified substantive rules of law by studying all the unified rules which have been promulgated by the different institutions.

Among the unified rules mentioned above, the UNIDROIT Principles can be a valuable source to be taken into account in defining the contents of a-national principles as they are designed to be applied "when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."[66] Also the flexibility of a-national principles in coping with changing circumstances in the future can also be ensured under the UNIDROIT Principles, as it is stated that while ensuring fairness in international commercial relations:

> "The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied ... [the UNIDROIT Principles] are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross border trade practice"[67]

At last, while developing the concept of a-national principles within this new framework, one thing that needs to be borne in mind is that such transnational commercial norms can only be properly and effectively applied by a truly transnational judicial control mechanism to ensure the unified interpretation of the rules. This is also observed by Professor Bonell, who said that "As regards the interpretation and application of the uniform law, it should be borne in mind that in the absence of a

---

[66]The Preamble of the *UNIDROIT Principles of International Commercial Contract*.

[67]UNIDROIT - International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994) at viii. At Bonell, M. J., "The UNIDROIT Principles of International Commercial Contracts: Why? What? How?" 69 *Tul.L.Rev.* 1121 (1995), at p. 1134.

supranational organ capable of ensuring its uniform interpretation there is always the risk that it will be interpreted differently in each state."[68]

Therefore, the present writer would propose a further suggestion that, apart from redefining the arbitration mechanism, the supra-national controlling body is also designed to produce uniform a-national principles on arbitration and international commerce in order to ensure to the greatest possible extent that both procedural and substantive rules are applied in a uniform manner. Moreover, this controlling body shall also hold regular consultations to keep continuous review of interpretation of a-national principles which will be always open to expansion and amendment in order to keep pace with the globalisation of international commerce.

Regional unification as a means of international integration

After building up the basic framework, the immediate question is how we can create a truly international arbitration mechanism and have every arbitration held in different locations of the world governed by the same set of rules, both procedural and substantive? A comparative study which provides a systematically analysis on the different national arbitration and commercial laws may lead us the answer. Nevertheless, an over-ambitious study on a world-wide scale may frustrate the implementation of the new approach due to the involvement of a large number of states and possible complications that may be created as a result.

In order to avoid frustrating the purpose of the new approach, regional unification would be a means of achieving a world-wide integration. We could consider the possibility of conducting unification on a regional basis among a small number of states, such as the movement in Europe. With a smaller number of states involved

---

[68]Bonell, M.J., "International Uniform Law in Practice - Or Where the Real Trouble Begins" 38 *Am.J.Comp.L.* 865 (1990), at p. 867.

which share similar cultures, backgrounds and interests, fewer difficulties may be encountered during the unification process. Through a comparative study, the goal of regional unification of the arbitration mechanism, arbitration law and international commercial law will be achieved. After collecting the arbitration and commercial laws codified in the different regions, the same process can be applied to create a truly international arbitration and commercial law on a world-wide scale in the future. For instance, ideally, one supervisory body should be established in each region and this supervisory body will report its progress to the supra-national controlling body.

To sum up, with the giving up of the supervisory powers by the states and the creation of truly international arbitration and commercial laws, international commercial arbitration would be supervised by the same central organisation, conducted under the same procedural rules, resolved by the unified substantive law and, finally, enforceable in every country of the world. If this suggested new approach and framework can be accepted and carried out step-by-step through co-operation between the states and practitioners, not only will the notion of a-national principles have a chance to flourish, but also the dream of truly international commercial arbitration will be achievable in a reasonable length of time.

In fact, as pointed by Professor Goldstajn, regional unification is already in progress and has been based on very practical needs,[69] such as the achievement of the European Economic Community, the European Free Trade Association and the efforts of the League of Arab States,[70] the United States of America,[71] Canada,[72] and so on. Economic integration and the reform of municipal laws were the objectives of this movement. It is evident that large-scale modifications in municipal laws have also

[69]Goldstajn, "International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law", in Schmitthoff, *The Sources of the Law of International Trade - with Special Reference to East - West Trade*, (1964), at pp. 114-115.
[70]Mustafa, Draft of Unification of Laws of the League of Arab States, UNIDROIT, Year Book, 1958.
[71]Dezendrof, Uniform Laws in the US, UNIDROIT, Year Book 1958.
[72]UNIDROIT, Year Book 1957.

been carried out, such as the European Convention on International Commercial Arbitration[73] and the Inter-American Commercial Arbitration Convention.[74] Learning from such experience, with effort from each state and region a new set of arbitration rules and commercial laws which take account of the differences in the arbitration and commercial laws of the particular region can be formulated.

Practicality of this new approach - financial and temporal implications

The final concern with the suggested framework is the issue of practicality. The financial implications and the time factor in the implementation of a truly international arbitration framework will be important. In fact, in proposing this new approach, due to the number of parties and volume of work involved the present writer does not expect this goal to be achieved overnight. Instead, because the success of this new framework depends on the co-operation of states, the present writer believes that it will need a great length of time and a tremendous amount of effort and resources to complete this task. With these foreseeable difficulties which need to be overcome, it might be asked whether it is worthwhile spending this amount of money and time implementing this project. After reviewing the uncertainty of arbitration and arbitral awards caused by the different restrictions in municipal laws, the present writer is convinced that it is worthy of support.

The approach proposed is a reaction to the deficiencies of the four theories examined in the previous chapter and the conflict between arbitration practice and the restrictions imposed by municipal laws. The consequences of the conflict between the practice of arbitration and the attitudes of national courts have caused uncertainty for the operation of arbitration and the validity of arbitral awards. Because of the uncertainty caused by the different arbitration laws, not only will states have to invest money to review

---

[73] 484 UNTS 349.
[74] 14 *I.L.M.* 339 (1975).

arbitration laws, but also parties will have to spend a great amount of money to engage lawyers and experts to deal with such complications; in any case, they may risk a finding that the arbitral awards are invalid if the awards are contrary to the public policy and mandatory rules of the relevant countries.

The need to invest time and energy to develop the unification of the arbitration mechanism and arbitration laws is obvious. The UNCITRAL, established in 1966 with the object of harmonising and unifying the law of international trade, took ten years (1966-1976) to produce the UNCITRAL Arbitration Rules and nine years (1977-1985) to adopt the Model law on International Commercial Arbitration. Also, fifteen years (1980-1995) were invested to produce the *UNIDROIT Principles of International Commercial Contracts*, which was created to remedy the deficiencies encountered in international trade law. Moreover, it has taken the New York Convention almost four decades, from its formation in 1966 to 1996, to have 114 states ratify that Convention.

All these prove that harmonising and unifying the law of arbitration, international trade and the arbitration mechanism will be a large-scale operation, both in terms of finance and time scale. However, this long process has its merits. The result of this long process should produce a unification of arbitration systems and arbitration laws which will reduce the uncertainty suffered at present by parities to a minimum level, or even eliminate them completely; as a result, both the time and money of international business people will be saved in the long term. Hence, the practicality of this new approach cannot be denied.

In conclusion, when the states are ready to transfer their supervisory powers to a supra-national controlling body, when this controlling body can successfully provide sufficient independent machinery and facilities to conduct arbitration proceedings, and

when it develops both procedural and substantive rules to regulate the whole of the arbitration operation without any connection to states, then the truly international character of international commercial arbitration will have been recognised and adopted by domestic legal systems to the benefit of the international business community.

12.3 Concluding remark

Three decades ago, the application of a-national principles was "To Dream the Impossible Dream"[75] for the arbitration community. However, as this thesis has highlighted, during this thirty-year period this dream has been pursued. A-national principles have been applied in the practice of international commercial arbitration, of varying levels of acceptance from country to country. The conflicts existing within the present framework as well as other conflicts arising from a variety of aspects of arbitration, such as the issues of arbitrability, interim measures, mandatory rules, public policy, and so on, has been the source of inspiration for the approach presented in this thesis. The present writer is of the opinion that it is essential for those involved in international commercial arbitration to consider this new approach in order to take steps to eliminate the conflicts between arbitration practice and the hostile attitudes of national courts; enabling clearer communication of current developments within international commercial arbitration. Perhaps, it is also a time to sing for the concept of "internationalisation of international commercial arbitration."

[75]H.E. Judge Howard M. Holtzmann "A Task for the 21 Century: Creating a New International Court for Resolving Disputes on Enforceability of Arbitral Awards", in Hunter, Marriott and Veeder (eds.) *Internationalisation*, (1995), 109-114, at p. 109.

Table of Arbitration Awards

Petroleum Developments Limited v. Ruler of Abu Dhabi, (1951) 18 *International Law Report* 141.

Revere Copper & Brass, Inc. v. Overseas Investment Corps.(OPIC), (1978) 17 *International Legal Materials* 1321.

Republic of Indonesia v. Amco Asia Corp. (US) and others, (1986) 25 *International Legal Materials* 1441 and (1992) XVII *Yearbook of Commercial Arbitration*, 73.

Ruler of Qatar v. International Marine Oil Company Limited, (1953) 20 *International Law Report* 534.

Sapphire International Petroleum Ltd. v. The National Iranian Oil Company, (1964) 13 *International & Comparative Law Quarterly*, 1011.

Saudi Arabia v. Arabian American Oil Company (Aramco arbitration), (1963) 27 *International Law Report* 117.

Serbian Loans case, Permanent Court of International Justice, Series A, No. 14, P. 5, 11 W.C. 340 (1929).

Société Europeane d'Etudes et d'Enterprise (S.E.E.E.) v. Yugoslavia, (1959) *J.D.I.* 1074;

Socobel v. The Greek State, (1951) 18 *International Law Report* 3 (Tribual Civ. Brussels).

SPP (Middle East) Ltd., Hong Kong and Southern Pacific Properties Ltd., Hong Kong v. Arab Republic of Egypt and The Egyptian General Company for Tourism and Hotels, (1983) 22 *International Legal Materials* 752. The challenge procedures were published in (1984) 23 *International Legal Materials* 1048.

Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic, (1978) 17 *International Legal Material*, 3.

Trade & Transport, Inc. v. Valero Refining Co., (1990) 5, *Int'l Arb. Rep.*

Wimbledon case, [1926] PCIJ Series A, No. 1, p. 25.

Wintershall AG et al v. The Government of Qatar, (1989) 28 *International Legal Materials* 795.

Table of Court Cases

Austria

Dralle v. Rep. of Czechoslovakia, the Austrian Supreme Court (17 I.L.R. 155).

Norsolor v. Pabalk Ticaret, Report of the Supreme Court of Vienna, Nov. 18, 1982; (1984) IX *Yearbook of Commercial Arbitration* 159.

Belgium

Decision of the Court of First instance of Brussels, December 12, 1978, and confirmed by the Court of Appeal of Brussels on October 14, 1980.

England

Alcom v. Republic of Columbia [1984] AC 580; [1984] 2 WLR 750; [1984] 2 Ll LR 376.

Amin Rasheed Shipping Corporation; Al Watab, The v. Kuwait Insurance Co. [1984] AC 50; [1983] 3 WLR 241 (HL).

Antaios Compania naviera S.A. v. Salen Rederierna A.B. [1984] AC 191 (HL).

Anselme Dewavrin Fils et Cie v. Wilson and North-Eastern Ry. Shipping Co. Ltd. (1931) Ll LR 289

The Assunzione [1954] AC 224; [1954] P 150 (CA).

Atlantic Underwriting Agencies v. Compagnia di Assicurazione di Milano SpA [1979] 2 Ll Rep 240.

Aubert v. Maze (1801) 2 Bos. & Pul. 371.

Bank Mellat v. Helliniki Techniki SA [1984] QB 291.

Board of Trade v. Cayzer Irvine & Co. [1927] AC 610.

Boissevain v. Weil [1949] 1 KB 482 (CA)

Bonython v. Commonwealth of Australia [1951] AC 201 (PC).

Buerger v. New York Life Assurance Co. [1927] KB 930.

Bulk Oil (ZUG) A.G. v. Sun International Ltd. [1983] 1 Ll L R 655.

Bumper Development Corp. v. Commissioner of Police of the Metropolis [1991] 1 WLR 1362 (CA).

Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] AC 384.

The Colorado [1923] P. 102.

Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] AC 572.

Coppeé Lavalin v. Ken-Ren [1994] 2 WLR 631 (HL).

The Cristina [1938] AC 485.

Czarnikow v. Roth Schmidt & Co. [1922] 2 KB 478 (CA).

Dallal v. Bank Mellat [1986] QB 441; [1986] 2 WLR 745.

David Taylor & Son Ltd. v. Barnett Trading Co. [1958] 1 WLR. 562.

De Haber v. Queen of Portugal (1851) 17 Cl. B. 171.

Deutsche-und Tiefbohrgesellshaft v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (DST v. Rakoil) [1990] 1 AC 295; [1987] 3 WLR 1023.

Di Sora v. Phillipps (1836) 10 H.L.C. 624, Vol. 11 English report 1168.

Don v. Lippmann 5 Cl. & F. 1.

Duke of Burnswick v. King of Hanover (1848) 2 H.L.C. 1.

Dynamit A. G. v. Rio Tinto Co. [1918] AC 260.

E.I. du Pont de Nemours v. Agnew [1987] 2 Ll L R 592 (CA).

Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd. [1978] 1 Ll L R 357.

Fergusson v. Fyffe (1841) 2 Robinson 267.

Guaranty Trust Co. of New York v. Hannay [1918] 2 KB 623 (CA).

Hamlyn v. Talisker Distillery [1894] AC 202.

The Hollandia [1983] 1 AC 565.

Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (UK) Ltd. [1989] 1 Ll L R 473.

Home Insurance Co. and St. Paul Fire and Marine Insurance Co. v. Administratia Asigurarilor de Stat [1983] 2 Ll L R 674.

Hooper & Co. v. Balfour Williamson & Co. (1890) 62 L.T. 646.

Hutton v. Warren (1836) 1 M & W 466.

International Tank and Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C. [1975] 1 QB 224.

Jacobs v. Credit Lyonnais (1884) 112 QBD 589.

Jager v. Tolme and Runge [1916] 1 KB 939.

Kahler v. Midland Bank Ltd. [1950] AC 24.

Kent v. Estob (1802) 3 East 18.

King of Spain v. Machado (1827) 4 Russ. 225.

Knox v. Symmonds (1791) 1 Ves 369.

Koechlin & Cie. v. Kestenbaum [1927] 1 KB 616.

The Laconia (1863) 2 Moore PC (NS) 161.

Male v. Roberts (1800) 3 Esp. 163; Vol. 6 (1793-1807) English Report 170.

Maritime Insurance Co. v. Assekuranz-Union von 1869 (1935) 52 Ll L R 16.

Messina v. Petrococchino (1872) L.R. 4 PC 144.

The Metamorphosis [1953] 1 WLR 543.

Mitchell Gill v. Buchan [1921] SC 390.

Morgan v. Mather (1792) 2 Ves Jun. 15.

Mount Albert Borough Council [1938] AC 224.

Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru (Unpublished) Court of Appeal, 10 November 1987; (1988) XIII *Yearbook of Commercial Arbitration* 156.

Nelson v. Bridport (1845) Beav. 527 Vol. 36 (1838-1866) English Report 48-55.

The Njegos [1936] 90.

Norske Atlas Co. Ltd. v. London General Insurance Co. Ltd. [1927] 2 Ll Rep 104.

N.V. Handel Maatschappij J. Smits v. English Exports (London) Ltd. [1955] 2 Ll Rep 69.

N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay and Company Limited [1927] AC 604.

N.V. Vulcaan v. Mowinckels Rederi A/S [1938] 2 All E R 152.

Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen [1962] 2 Ll L R 257.

Overseas Union Insurance Ltd. v. A.A. Mutual Insurance Co. Ltd. [1988] 2 Ll L R 63.

The Parchim [1918] AC 157 (PC).

The Philippine Admiral Case [1976] 2 WLR 214.

Podar Tading Co. v. Tagher [1942] 2 KB 277.

Present of India v. La Pintada Compania Navigation S.A. [1985] 1 AC 104.

The Prins Frederik Case (1820) 2 Dods. 451.

R v. International Trustee for thr Protection of Bondholders [1937] AC 500.

Rassano v. Manufacturers Life Insurance Co.[1962] 2 All ER 214.

Re Helbert Wagg & Co. Ltd. [1956] Ch. 323.

Re United Railways of the Havana and Regla Warehouses Ltd. [1960] Ch. 52; [1961] AC 1007.

River Thames Insurance Co. Ltd. v. Al Ahleia Insurance Co. S.A.K. [1973] 2 Ll L R 2.

Robinson v. Bland (1760) 1 Wm Bl 234, 2 Burr 1077.

Rolland v. Cassidy (1888) 13 AC 770.772-773.

Scottish Provident Institution v. Cohen & Co. (1888) 16 R 112.

Sharif v. Azad [1967] 1 QB 605.

Techno-Impex v. Gebr. van Weelde Scheepvaartkantoor B.V. [1981] 2 All E R 669; [1982] 3 All ER 669.

Thai-Europe Ltd. v. Pakistan Government [1975] 1 WLR 1485.

Trendtex Trading Corp. v. Central Bank of Nigeria [1977] QB 529.

Tzortzis v. Monark Line A/B [1968] 1 WLR 406.

Union of India v. McDonnell Douglas Corporation [1993] 2 Ll Rep 48.

Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] AC 277.

Vulcaan (N.V. etc.) v. Mowinckels Rederi A/S [1938] 2 All. E.R. 152.

Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1970] AC 583.

Williamson v. Taylor (1845) 8 D 156.

Woodward v. Rowe (1666) 2 KB 132, 84 English Report 84.

France

AKSA v. Norsolor, (1981) 20 *International Legal Materials* 883, Cour d'Appeal, Paris, Judgement of 9 December 1980, the Supreme Court of Vienna, Nov. 18, 1982, [1984] IX *Yearbook of Commercial Arbitration* 159.

Compagnie l'Alliance v. Prunier, Cass. civ. 10 July 1843, D. 1843.I.343, S. 1843.I 561.

Compania Valenciana de Cementos Portland SA v. Primary Coal Inc., (1991) XVI *Yearbook of Commercial Arbitration* , Cour d'Appel, 13 July 1989; Cour de Cassation, 22 October 1991, (1993) XVI *Yearbook of Commercial Arbitration* 142.

General National Maritime Transport Co. v. Société Götaverken Aidenal A.B., Judgment 21 February 1980, Cour d'Appel de Paris.

K/S France SA and K/S Photo Industrie SA v. SA Societe Generale and Sogelease Corporation, (1991) XVIII *Yearbook of Commercial Arbitration* 137; Cour d'Appel, Paris, 31 October 1989.

Najer v. Synthelabo, (1987) *Rev. Arb.* 519.

Phoceenne de Depot v. Depots Patrollers de Fos, Cour d'Appel de Paris, 28 April 1988 *Rev. Arb.* 1989, 280. Cour de Cassation; Pourvoi n. 89-20.629, 12 mai 1991, Arret n. 567, La Cour de Cassation, Deuxieme Chambre Civile.

Société Intrafor Coloret Subtec Middle East Co. M.M. Gagnant Gialbert et al, (1985) *Revue de l'Arbitrage* 300.

Scoiété Pabalk Ticaret Sirketi v. Soc. Anon. Norsolor, (1986) XI *Yearbook of Commercial Arbitration* 484; the Supreme Court of Austria, (1984) IX *Yearbook of Commercial Arbitration* 159.

SEEE v. République Populaire Fédérale de Yougoslavie, (1959) *J.D.I.* 1074.

Decision of Feb. 21, 1980, Court of Appeal, Paris, (1980) 107 *Journal de Droit International* 660, [1980] *Rev. Arb.* 524 and (1981) 20 *International Legal Materials* 883.

Scotland

ERDC Construction Limited v. H. M. Love & Company and others, Court of Session, 26 July, 1996. (Unreported.)

Taiwan

67-Tai-Shang-Tze 3762 ROC Supreme Court 1978.

70 Su-TZE-2359, Taipei District Court, 1981.

No. 1265 Tai-Shang, The Supreme Court, 1994.

Award No. 1043 Shang Jong Thin Tze .

USA

In re Aimcee Wholesale Corp. & Tomar Prods. 21 N.Y. 2d. 621, 237 N.E. 2d. 223, 289 N.Y.S. 2d. 968 (1968).

Allied Bruce Terminix Co. v. Dobson 115 S. Ct. 834 (1995).

American Safety Equipment Corp. v. J.P. Maguire & Co. 391 F 2d 821 (1968).

Victory Transort Inc. v. Comisaria General de Abastecimientos y Transportes (1971) 35 International Law Report 110.

Whitaker v. Spiegel Inc. 623 P. 2d 1147 (Wash 1981).

Wilko v. Swan 346 US 427 (1953), 98 L. Ed 168, 74 S.Ct. 182.

Bibliography

Reference to Books

Anton, Alexander Elder. *Private International Law - A Treatise from the Standpoint of Scots Law*, Edinburgh, W. Green, 1990.

Association, L. C. L. B. *The London Arbitration Scheme*, London, 1986.

Atiyah, Patrick Selim. *Essays on Contract*, Oxford, Clarendon Press, 1986.

Atiyah, Patrick Selim. *An Introduction to the Law of Contract*, Oxford, Clarendon Press, 1989.

Aubert, Vilhelm. *In Search of Law - Sociological Approaches to Law*, Oxford, Martin Robertson, 1983.

Avanessian, Aida B. *Iran-United States Claims Tribunal in Action*, London, Graham & Tortman, 1993.

Badr, Gamal, Moursi. *State Immunity - An Analytical and Prognostic View*, Hague, Martinus Nijhoff Publishers, 1984.

Baker, Stewart, Abercrombie. and Davis, Mark, David. *The UNCITRAL Arbitration Rules in Practice - The Experience of the Iran-United States Claims Tribunal*, Deventer, Kluwer Law and Taxation Publishers, 1992.

Bayles, Michael, D. *Hart's Legal Philosophy - An Examination*, London, Kluwer Academic Publishers, 1992.

Behrman, Jack, Newton. *US International Business and Government*, New York, McGraw-Hill Inc., 1971.

Berger, Klaus Peter. *International Economic Arbitration*, Deventer, Kluwer Law and Taxation Publishers, 1993.

Bernstein, Ronald. and Wood, D. A. *Handbook of Arbitration Practice*, London, Sweet & Maxwell, 1993.

Bianca, C.M. and Bonell, M.J. *Commentary on the International Sales Law - The 1980 Vienna Sales Convention*, Milan, Giuffré, 1987.

Böckstiegel, Karl-Helnz. *Arbitration and State Enterprises - A Survey on the National and International State of Law and Practice*, Deventer, Kluwer Law and Taxation Publishers, 1989.

Born, Gary B. *International Commercial Arbitration in the United States - Commentary & Materials*, Deventer, Kluwer Law and Taxation Publishers, 1994.

Bos, Maarten., & Brownlie, Ian. *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, Oxford, Clarendon Press, 1978.

Brown, Henry. J. and Marriott, Arthur. L. *ADR Principles and Practice*, London, Sweet & Maxwell, 1993.

Bucher, Andreas and Tschanz, Pierre-Yves. *International Arbitration in Switzerland*, Basle, Switzerland, Helbing & Lichtenhahn A.G, 1989.

Byrne, Peter. *The EEC Convention on Jurisdiction and the Enforcement of Judgments*, Dublin, The Round Hall Press, 1990.

Calamari, John. D. & Perillo, Joseph. M. *The Law of Contract*, (3rd ed.) West Publishing Co. St. Paul, Minn, 1987.

Carbonneau, Thomas E. (ed.) *Resolving Transnational Dsiputes Through International Arbitration (Sixth Sokol Colloquium)*, Charlottesville, University Press of Virginia, 1984.

Carbonneau, Thomas E. (ed.) *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, Inc., 1990.

Castel, Jean-Gabriel. *Private International Law - A Comparative Study of the Rules Prevailing in Canada and the United States*, Toronto, Canada Law Books Co. Ltd., 1960.

Castel, Jean-Gabriel. *Introduction to Conflict of Laws*, Canada, Butterworths & Co. Ltd., 1978.

Cheng, Dejun. Moser, Michael. J. and Wang, Shengchang. *International Arbitration in the People's Republic of China, Commentary, Cases and Materials*, Hong Kong, Butterworths Asia, 1995.

Cherian, Joy. *Investment Contracts and Arbitration (The World Bank Convention on the Settlement of Investment Disputes)*, A.W. Sijthoff International Publishing Company B.V., 1975.

Chukwumerije, Okezie. *Choice of Law in International Commercial Arbitration*, London, Quorum Books, 1994.

Collier, J. G. *Conflicts of Laws*, Cambridge, Cambridge University Press, 1987.

Collins, Lawrence. *Dicey and Morris on the Conflict of Law*, London, Stevens & Sons Limited, 1987.

Colloquium on the Interpretation of the Brussels Convention by the Court of Justice Considered in the Context of the European Judicial Area, 1991, Luxembourg Court of Justice of the European Communities. Civil Jurisdiction and Judgments in Europe, London, Butterworths, 1992.

Cooke, Philip. J. and Oughton, D. W. *The Common Law of Obligation*, (2nd ed.) London, Butterworths, 1993.

Craig, W. Laurence., Park, William, W., and Paulsson, Jan. *International Chamber of Commerce Arbitration*, (2nd ed.) London, Oceana Publications Inc., 1991.

Czinkota, Michael, R., Rivoli, Pietra. and Ronkainen, Ilkka, A. *International Business*, London, The Dryden Press, 1989.

Dashwood, Alan. and Hacon, Richard, J. and White, Robin, C.A. *A Guide to the Civil Jurisdiction and Judgments Convention*, Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1987.

David, René. *French Law - Its Structure, Sources, and Methodology*, Baton Rough, Louisiana State University Press, 1972.

David, René. *English Law and French Law - A Comparison in Substance Tagore Law Lectures*, London, Stevens & Sons, 1980.

David, René. *Arbitration in International Trade*, Deventer, Kluwer Law and Taxation Publishers, 1985.

David, René. and Brierley, J. E. C. *Major Legal Systems in the World Today*, London, Stevens & Sons, 1978.

David, René. and de Vries, H. P. *The French Legal System - An Introduction to Civil Law Systems*, New York, Oceana Publications, 1958.

Davidson, Fraser. P. *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, Edinburgh, W. Green, 1991.

Davies, Wendy. and Fouracre, Paul. (ed.) *The Settlement of Disputes in Early Medieval Europe*, London, Cambridge University Press, 1986.

De Lupis, Ingrid, D. *International Law and the Independent State*, (2nd ed.) England, Gower Publishing Company Limited, 1987.

De Ly, Filip. *International Business Law and Lex Mercatoria*, Amsterdam, North-Holland, 1992.

Departmental Advisory Committee on Arbitration Law, *Supplementary Report on the Arbitration Act 1996*, London, DAC, 1996.

Domke, Martin. (ed.) *International Trade Arbitration - A Road to World-Wide Corporation*, New York, American Arbitration Association, 1958.

Domke, Martin. *Commercial Arbitration*, Englewood Cliffs, Prentice-Hall Inc., 1965.

Dore, Isaak I. *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, London, Grsham & Tortman, 1992.

Ehrenzweig, Albert, Armin. and Jayme, E. *Private International Law - A Comparative Treaties on American International Conflicts of Law, Including the Law of Admiralty*, Netherlands, A.W. Sijthoff International Publishing Company, 1973.

Erades, Lambertus. *Interactions between International and Municipal Law - A Comparative Case Law Study*, The Hague, T.M.C. Asser Instituut, 1993.

Fabricius, Fritz. *Law and International Trade*, Frankfurt, Athenäum Verlag, 1973.

Fatouros, Arghyrios, *A. Government Guarantees to Foreign Investors*, New York, Columbia University Press, 1962.

Fawcett, James, J. (ed.) *Declining Jurisdiction in Private International Law*, Oxford, Clarendon, 1995.

Forsyth, C. F. and Bennett, T. W. *Private International Law*, Cape Town, Juta & Co. Ltd, 1981.

Friedmann, Wolfgang, *Public and Private Enterprises in Mixed Economies*, London, Steven & Sons, 1974.

Gill, William, H. and Marshall, Enid, A. *The Law of Arbitration*, London, Sweet & Maxwell, 1983.

Gloag, W. M. and Henderson, R. Candlish. *Introduction to the Law of Scotland*, (9th ed.) Edinburgh, W. Green & Son Ltd, 1987.

Glossner, Ottoarndt. *Commercial Arbitration in the Federal Republic of Germany*, Deventer, Kluwer Law and Taxation Publishers, 1984.

Goldman, Berhold. *Lex Mercatoria, Forum Internationale*, No. 3, November 1983.

Graveson, R. H. *Comparative Conflict of Laws - Selected Essays*, Amsterdam, North-Holland Publishing Company, 1977.

Graveson, Ronald, Harry. *One Law - On Jurisprudence and The Unification of Law - Selected Essays*, Amsterdam, North-Holland Publishing Company, 1976.

Grigera Naón, Horacio, A. *Choice-of-Law Problems in International Commercial Arbitration*, J.C.B. Mohr (Paul Siebeck) Tübingen, 1992.

Habicht, Max. *The Power of the International Judge to Give A Decision "Ex Aequo Et Bono"*, London, Constable & Co. Ltd, 1935.

Hart, H. L. A. *The Concept of Law*, (2nd rev. ed.) Oxford, Oxford University Press, 1994.

Hirsch, Moshe. *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes*, Dordrecht, Martinus Nijhoff Publishers, 1993.

Holtzmann, Howard M. and Neuhaus, Joseph E. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Deventer, Kluwer Law and Taxation, 1989.

Horn, Norbert., & Schmitthoff, Clive M. *The Transnational Law of International Commercial Transactions*, Deventer, Kluwer, 1982.

Hunter, Martin, Marriott, Arthur, and Veeder, V.V. (eds.) *The Internationalisation of International Arbitration*, London, Graham & Tortman Limited, 1995.

Hunter, Robert. *The Law of Arbitration in Scotland*, Edinburgh, T & T Clark, 1987.

International Chamber of Commerce. *60 Years of ICC Arbitration - A Look at the Future*, Paris, ICC Publishing S.A, 1984.

International Chamber of Commerce. *The Arbitral Process and the Independence of Arbitrators - International Court of Arbitration*, Paris, ICC Publishing S.A, 1991.

International Chamber of Commerce. *International Commercial Arbitration in Europe*, Paris, ICC Publishing S.A, 1994.

International Chamber of Commerce. *The ICC International Court of Arbitration Bulletin*, Paris, ICC Publishing S.A., 1995.

Jarvin, Sigvard. International Chamber of Commerce. and Derains, Yves. (ed.) *Collection of ICC Arbitral Awards, 1974-1985*, Paris, ICC Publishing S.A., 1990.

Jarvin, Sigvard. International Chamber of Commerce. and Derains, Yves. (ed.) *Collection of ICC Arbitral Awards, 1986-1990*, Paris, ICC Publishing S.A., 1994.

Johnson, Derek, Kirby. *International Commodity Arbitration*, London, Lloyd's of London Press, 1991.

Juenger, Friedrich, K. *Choice of Law and Multistate Justice*, London, Martinus Nijhoff Publishers, 1993.

Kaplan, Neil. Spruce, Jill. and Cheng, T. Y.W., *Hong Kong Arbitration, Cases and Materials*, Hong Kong, Butterworths, 1991.

Kerr, Michael. *Concord and Conflict in International Arbitration*, London, King's College, 1996.

Kostecki, M. M. (ed.) *State Trading in International Markets - Theory and Practice of Industrialized and Developing Countries*, London, The MacMillan Press Ltd, 1982.

Lacey, John. R. and Barnes, William, Sprague. (ed.) *The Law and Policy of International Business*, London, University Press of America, Inc., 1991.

Lee, E. *Encyclopaedia of International Commercial Arbitration*, London, Lloyd's of London Press Ltd, 1986.

Lew, Julian, D. M. (ed.) *Contemporary Problems in International Arbitration*, London, Centre for Commercial Law Studies, Queen's Mary College, 1986.

Lew, Julian, D.M. *The Applicable Law in International Commercial Arbitration*, Dobbs Ferry, N.Y., Oceana Publications, 1978.

Lew, Julian, D. M. (ed.) *The Immunity of Arbitrators*, London, Lloyd's of London Press, 1990.

Lewis, Charles, J. *State and Diplomatic Immunity*, (3rd ed.) London, Lloyd's of London Press Ltd., 1990.

Lillich, Richard, B. *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, University Press of Virginia, 1983.

Lookofsky, Joseph, M. *Transnational Litigation and Commercial Arbitration - A Comparative Analysis of American, European and International Law*, Denmark, Transnational Juris Publications Inc., 1992.

MacNeil, Ian, R. *Contracts - Exchange Transactions and Relations - Cases and Materials*, 2nd ed. New York, The Foundation Press Inc., 1978.

MacNeil, Ian, R. *American Arbitration Law*, New York, Oxford University Press, 1992.

Mann, F. A. *Notes and Comments on Cases in International Law*, Commercial Law and Arbitration. Oxford, Clarendon Press, 1992.

Maxwell, David. *The Practice of the Court of Session*, Edinburgh, Scottish Court's Administration, 1980.

McBryde, William. W. *The Law of Contract in Scotland*, Edinburgh, W. Green & Son Ltd., 1987.

McClendon, J. Stewart. & Goodman, Rosabel, E. Everard. *International Commercial Arbitration in New York*, New York, Transnational Publishers Inc., 1986.

Mustill, Michael. & Boyd, Stewart, C. *The Law and Practice of Commercial Arbitration in England*, (2nd ed.) London, Butterworths, 1989.

Nantwi, E. K. *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, Netherlands, A.W. Sijthoff-Leyden, 1966.

National Consumer Council. *Out of Court: A Consumer View of Three Low-Cost Trade Arbitration Scheme*, London, National Consumer Council, January 1991 .

Neale, A. D. and Stephens, M. L. *International Business and National Jurisdiction*, Oxford, Clarenden Press, 1988.

North, Peter, Machin. *Essays in Private International Law*, Oxford, Clarendon Press, 1993.

North, Peter, Machin. & Faweett, James, J. *Cheshire and North's Private International Law*, London, Butterworths, 1992.

Ott, David. H. *Public International Law in the Modern World*, London, Pitman Publishing, 1987.

Paasivirta, Esa. *Participation of States in International Contracts, and Arbitral Settlement of Disputes*, Helsinki, Lakimiesliiton Kustannus (Finnish Lawyers' Publishing Company), 1990.

Parris, John. *Arbitration: Principles and Practice*, London, Granada Publishing Limited, 1983.

Patchett, Keith, William. *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - Explanatory Documentation Prepared for Commonwealth Jurisdiction (In association with the Commonwealth Secretariat)*, London, The Commonwealth Secretariat, 1981 June.

Patchett, Keith, William. *Recognition of Commercial Judgements Awards in Commonwealth*, London, Butterworths & Co. Ltd., 1984.

Perrott, David, L. and Pogany, Istavan, S. *Current Issues in International Business Law*, Avebury, Gower Publishing Company Limited, 1988.

Peter, Wolfgang. *Arbitration and Renegotiation of International Investment Agreements*, Dordrecht, Martinus Nijhoff Publishers, 1986.

Petersmann, Ernst-Ulrich and Jacnicke, Gunther. *Adjudication of International Trade Disputes in Internaitonal and National Economic Law*, Vol. 7, Switzerland, University Press Fribourg Switzerland, 1992.

Platto, Charles. *Enforcement of Foreign Judgments Worldwide*, London, Graham & Tortman, 1989.

Rabel, Ernst. *The Conflict of Laws: A Comparative Study*, Ann Arbor, University of Michigan Law School, 1960.

Redfern Alan. &. Hunter, Martin. *Law and Practice of International Commercial Arbitration*, (2nd ed.) London, Sweet & Maxwell, 1986.

Reese, Willis. L. M. and Rosenberg, M. *Cases and Materials on Conflict of Laws*, (8th ed.) New York, The Foundation Press Inc., 1984.

Robert, Jean. and Carbonneau, Thomas E. *The French Law of Arbitration*, New York, Matthew Bender, 1983.

Rose, Francis, Dennis. (ed.) *International Commercial and Maritime Arbitration*, London, Sweet & Maxwell, 1988.

Rossi, Christopher, R. *Equity As A Source of International Law? A Legal Realist Approach to the Process of International Decisionmaking*, (Thesis) Baltimore, The John Hopkins University, 1990.

Rowland, Peter, M. B. *Arbitration Law and Practice*, England, Institute of Chartered Accountants, 1988.

Rubino-Sammartano, Mauro. *International Arbitration Law*, Deventer, Kluwer Law and Taxation Publishers, 1990.

Rutherford, Margaret and Sims, John H.M. *Arbitration Act 1996: A Practical Guide*, London, Law & Tax, 1996.

Samuel, Adams. *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law*, Zürich and Schulthess Polygraphischer Verlag Zurich, 1989.

Sanders, Pieter. *International Arbitration Liber Amicorum for Martin Domke*, The Hague, Martinus Nijhoff, 1967.

Sanders, Pieter. *New Trend in the Development of International Commercial Arbitration and the Role of Arbitral and other Institutions (VIIth International Arbitration Congress by International Council for Commercial Arbitration)*, Deventer, Kluwer Law and Taxation Publishers, 1983.

Sanders, Pieter (ed.) *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation, International Council for Commercial Arbitration*, The Hague, Kluwer Law and Taxation Publishers, 1989.

Sanders, Pieter. *International Handbook on Commercial Arbitration*, (2nd ed.) Deventer, Kluwer Law and Taxation Publishers, 1993.

Sarcevic, Petar. *Essays on International Commercial Arbitration*, London, Graham & Tortman Limited, 1989.

Sarcevic, Petar. (ed.) *International Contracts and Conflict of Laws - A Collection of Essays*, London, Graham & Tortman Limited, 1990.

Schmitthoff, Clive M. (ed.) *The Sources of the Law of International Trade - with Special Reference to East - West Trade*, London, Stevens & Sons, 1964.

Schmitthoff, Clive M. *The Sources of The Law of International Trade*, London, Stevens & Sons, 1964.

Schmitthoff, Clive M. *Commercial Law in A Changing Economic Climate*, London, Sweet & Maxwell, 1981.

Schreuer, Christoph, H. *Commercial Transactions in the Recent Codification of State Immunity*, Cambridge, Grotius Publications Limited, 1988.

Schreuer, Christoph, H. *State Immunity: Some Recent Developments*, Cambridge, Grotius Publications Limited, 1988.

Schultsz, Jan, C. and van den Berg, Albert. J. (eds) *The Art of Arbitration - Essays on International Arbitration Liber Amicorum Pieter Sanders, 12 September 1912-1982*, Deventer, Kluwer Law and Taxation Publishers, 1982.

Schwebel, Stephen, Myron. *International Arbitration: Three Salient Problems*, Cambridge, Grotius Publications Limited, 1987.

Seidl-Holhenveldern, Ignaz. *Corporations in and under International Law*, Cambridge, Grotius Publications Limited, 1987.

Selected Works of China International Economic and Trade Arbitration Commission Awards (1963-1988) Updated to 1993, Hong Kong, Sweet & Maxwell, 1995.

Shaw, Malcolm, N. *International Law*, Cambridge, Grotius Publications Limited, 1991.

Simmonds, Keith, Royston. and Hill, Brian, H. W. and Jarvin, Sigvard. (ed.) *Commercial Arbitration Law in Asia and the Pacific*, Paris, ICC Publishing S.A. 1987.

Simpson, John, Liddle. and Fox, Hazel. *International Arbitration - Law and Practice*, London, Steven & Sons Limited, 1959.

Sornarajah, M. *The Pursuit of Nationalized Property*, Lancaster, Kluwer Academic Publishers, 1986.

Sornarajah, M. *International Commercial Arbitration - the Problem of State Contracts*, Singapore, Longman Singapore Publishes Ltd., 1990.

Sornarajah, M. *The International Law on Foreign Investment*, Cambridge, Cambrodge University Press, 1994.

Starke, Joseph, Gabriel. *An Introduction to International Law*, (10th ed.) London, Butterworth, 1989.

Sucharitkul, Sompong. *State Immunities and Trading Activities in International Law*, London, Stevens & Sons Limited, 1959.

Summerfield, Peter. & Campbell, Dennis. (ed.) *Effective Dispute Resolution for the International Commercial Lawyer*, Deventer, Kluwer Law and Taxation Publisher, 1989.

Swedish Chamber of Commerce. *Arbitration in Sweden*, Stockholm, Stockholm Chamber of Commerce, 1977.

Thomas, David, Rhidian. *The Law and Practice Relating to Appeals from Arbitration Awards*, London, Lloyd's of London Press Ltd., 1994.

Tomastic, Roman. *The Sociology of Law*, London, Sage Publications, 1985.

Toope, Stephen J. *Mixed International Arbitration: Studies in Arbitration between States and Private Persons*, Cambridge, Grotius Publisher, 1990.

Trakman, Leon E. *The Law Merchant - The Evolution of Commercial Law*, Colorado, Fred B. Rothman & Co. 1983.

Uff, John. and Jones, Elizabeth. (ed.) *International and ICC Arbitration: Conference Papers and Source Material*, London, Centre of Construction Law & Management, 1990.

UNIDROIT. *New Directions in International Trade Law*, Vol. I and II, Dobbs Ferry, N.Y., Oceana Publications, Inc., 1977.

UNIDROIT (The Governing Working Group). *Principles of International Commercial Contracts*, Rome, UNDROIT, 1994.

van den Berg, Albert Jan. *The New York Convention of 1958 - Towards a Uniform Judicial Interpretation*, Antwerp, Kluwer Law and Taxation Publishers, 1981.

van den Berg, Albert Jan., van Delden, R. and Snijders, H.J. *Netherlands Arbitration Law*, Deventer, Kluwer Law and Taxation Publishers, 1993.

van Hof, Jacomijn J. *Commentary on the UNCITRAL Arbitration Rules*, Deventer, Kluwer Law and Taxation Publishers, 1991.

van Houtte, Hans. *The Law of International Trade*, London, Sweet & Maxwell, 1995.

Walker, David, Maxwell. *The Law of Contracts and Related Obligations in Scotland*, (3rd ed.) London, T & T Clark, 1995.

Walton, Anthony. and Victoria, Mary. *Russells on the Laws of Arbitration*, (20th ed.) London, Stevens & Sons Limited, 1982.

Westberg, John, *A. International Transactions and Claims Involving Government Parties - Case Law of the Iran-United States Claims Tribunal*, Washington, D.C., International Law Institute, 1991.

Wetter, Jan, Gills. *The International Arbitral Process - Public and Private*, New York, Oceana Publications Inc., 1979.

Wilinson, A.B. and Wilson, William, Adam. (ed.) *Introduction to the Law of Scotland*, Edinburgh, W. Green & Son Ltd., 1987.

Reference to Journals

Amato, Paul. "UN Convention on Contracts for the International Sale of Goods - The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts" (1993) 13 *Journal of Law and Commerce* 1.

Ancel, Jean-Pierre. "French Judicial Attitudes Toward International Arbitration", (1993) 9(2) *Arbitration International*, 121.

Arfazadeh, Homayoon. "New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur", (1991) 8(4) *Journal of International Arbitration*, 103.

Audit, Bernard. "Arbitration and the Brussels Convention", (1993) 9(1) *Arbitration International*, 1.

Avanessian, Aida B. "The New York Convention and Delocalised Arbitral Awards", (1991) 8(1) *Journal of International Arbitration*, 6.

Banakas, E.K. "The Immunity of Arbitrators from Negligence", (1976) 35 *Cambridge Law Journal*, 41.

Bauerfeld, Richard J. "Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?", 82 *Columbia Law Review*, 1659 (1982).

Beale, Joseph H. "Equity in America", (1921-1923) 1 *Cambridge Law Journal*, 21.

Bellet, Pierre. "Foreword", (1984) 16 *Law & Policy in International Business*, 667.

Bentil, J. Kodwo. "Making England A More Attractive Venue for International Commercial Arbitration by Less Judicial Oversight", (1988) 5(1) *Journal of international Arbitration*, 49.

Bentil, J. Kodwo. "Commercial Arbitrators Authorised Not to Apply Strict Rules of Law and Judicial Review", (1992) *Journal of Business Law*, 26.

Bingham, Anthony. "The New Arbitration Bill", (1996) 62(1) *Arbitration*, 29.

Blessing, Marc. "Globalization (and Harmonization?) of Arbitration", (1992) 9(1) *Journal of International Arbitration*, 79.

Bond, Stephen R. "Party Autonomy: The Choice of Place", (1992) 8 (1) *Arbitration International*, 83.

Bonell, Michael Joachim. "International Uniform Law in Practice - Or Where the Real Trouble Begins", 38 *The American Journal of Comparative Law*, 865 (1990).

Bonell, Michael Joachim. "Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts", 40 *The American Journal of Comparative Law*, 617 (1992).

Bonell, Michael Joachim. "The UNIDROIT Principles of International Commercial Contracts: Why? What? How?", 69 *Tulane Law Review*, 1121 (1995).

Borchers, Patrick J. "Choice of Law in the American Courts in 1992: Observations and Reflections", 42(1).*The American Journal of Comparative Law*, 125 (1994).

Bouchez, Leo J. "The Prospects for International Arbitration: Disputes between States and Private Enterprises", (1991) 8(1) *Journal of International Arbitration*, 81.

Bouzan, Eloise H. "The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence", 30 *Texas International Law Journal* 205 (1995).

Boyd, Steward. "Innovation and Reform in the Law of Arbitration", (1983) 2 *Civil Justice Quarterly*, 148.

Boyd, Stewart. ""Arbitration Not to Be Bound by the Law" Clauses", (1990) 6 (2) *Arbitration International*, 122.

Brand, Ronald A. "International Trade Law and the Arbitration of Administrative Law Matters: *Farrel Corp. v. US International Trade Commission*", 31 *Columbia Journal of Transnational Law*, 181 (1993-1994).

Brandon, Michael. "Practice Issues Arising in CIETAC Arbitrations", *American Bar Association Newsletter*, 26 (1995).

Broches, Aron. "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", (1979) *Recueil Des Cour II*, 387.

Brown, William. "Commercial Arbitration and the European Economic Community" (1985) 2 (1) *Journal of International Arbitration*, 21.

Caldwell, Peter S. "Arbitration in Hong Kong", *American Bar Association Newsletter*, 8 (1995) .

Cane, Marilyn Blumberg. and Shub, Patricia A. "The Arbitrator's Manual", (1992) 9 (3) *Journal of International Arbitration*, 69.

Caron, David D. "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", 84 *The American Journal of International Law*, 105 (1990).

Chang, Wang Sheng. "A Comparative Survey of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission", (1992) 9 (4) *Journal of international Arbitration*, 93.

Chapdelaine, Pascale. "The Temporal Application of the New York Arbitration Convention of 1958: Retroactivity or Immediate Application?", (1992) 8 (1) *Arbitration International*, 73.

Chen, C.V. "The Legal Status of Transnational Commercial Arbitration in the Republic of China on Taiwan", (1992) 13(1) *Private Investors Abroad*, 13-1.

Chi, Shaojie. "Arbitration Mechanism to be Updated in China", (1995) *International Business Lawyer*, 16.

Chodosh, Hiram E. "An Interpretative Theory of International Law: The Distinction Between Treaty and Customary Law", 28 (5) *Vanderbilt Journal of Transnational Law*, 973 (1995).

Christie, R.H. "Amiable Composition in French and English Law", (1992) 58(4) *Journal of the Chartered Institution of Arbitration*, 259.

Chukwumerije, Okezie. "Applicable Substantive Law in International Commercial Arbitration", 23(3) *Anglo-American Law Review*, 265 (1994).

Clarence-Smith, J. A. "Personal Jurisdiction", (1953) 2 *International & Comparative Law Quarterly*, 510.

Coad, Brian Douglas. "The Canadian State Immunity Act", (1983) 14 *Law & Policy in International Business*, 1197.

Contini, Paolo. "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award", (1959) 8 *The American Journal Comparative Law*, 283.

Coulson, Robert. "Will the Growth of Alternative Dispute Resolution (ADR) in America be Replicated in Europe?", (1992) 8 (3) *Arbitration International*, 39.

Counter, K. N. S. "The Proper Law of Contract - A Re-Examination", (1965) *Journal of Business Law*, 326.

Covo, Jacques. "Commodities Arbitrations and Equitable Considerations", (1993) 9 (1) *Arbitration International*, 57.

Craig, W. Laurence. "International Ambition and National Restraints in ICC Arbitration", (1985) 1(1) *Arbitration International*, 49.

Craig, W. Laurence., Park, William W. and Paulsson Jan.(1981) "French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981", (1981) 13 *Law & Policy in International Business*, 727.

Craig, W. Laurence. "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration", 30(1) *Texas International Law Journal*, 1 (1995).

Crockett, Clyde H. "Choice of Law: Aspects of the Foreign Sovereign Immunities Act of 1976", (1983) 14 *Law & Policy in International Business*, 1041.

Croff, Carlo. "The Applicable Law in the International Commercial Arbitration: Is It Still a Conflict of Laws Problem", (1982) 16 *The International Lawyer*, 613.

Croft, Clyde. "Australia, Adopts the UNCITRAL Model Law", (1989) 5(2) *Arbitration International*, 189.

Crook, John R. "Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience", 83 *American Journal of International Law*, 278 (1989).

Davidson, Fraser. "International Commercial Arbitration - The United Kingdom and UNCITRAL Model Law", (1990) *Journal of Business Law*, 480.

Davidson, Fraser. "Where Is An Arbitral Award Made? - *Hiscox v. Outhwaite*", (1992) 41 *International and Comparative Law Quarterly*, 637.

De Enterría, Javier García. "The Role of Public Policy in International Commercial Arbitration", 21 *Law and Policy in International Business*, 389 (1990).

De la Houssaye, Isabella. "Manifest Disregard of the Law in International Commercial Arbitration", 28 *Columbia Journal of Transnational Law*, 449 (1990).

De Ly, Filip. "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", 12 *Northwestern Journal of International Law and Business*, 48 (1991).

De Vries, H. P. "International Commercial Arbitration: A Contractual Substitute for National Courts", 57 *Tulane Law Review*, 42 (1982).

Delaume, Georges R. "State Contracts and Transnational Arbitration", 75 *The American Journal of International Law*, 784 (1981).

Delaume, Georges R. "ICSID Arbitration and the Courts", 77 *The American Journal of International Law*, 784 (1983).

Delaume, Georges R. "Economic Development and Sovereign Immunity", 79 *The American Journal of International Law*, 319 (1985).

Delaume, Georges. R. " The Proper Law of State Contracts and the *Lex Mercatoria*: A Reappraisal", 3 *ICSID Review*, 79 (1988).

Delaume, Georges. R. "Comparative Analysis as a Basis of Law in State Contracts: the Myth of the *Lex Mercatoria*", 63 *Tulane Law Review*, 575 (1989).

Delaume, Georges. R. "Choice-of-Forum and Arbitration Clauses in the United States", (1996) 13 *Journal of International Arbitration*, 81.

Deshpande, V. S. "Enforcement of Foreign Awards in India, UK and U.S.A." (1987) 4(1) *Journal of International Arbitration*, 40.

Deshpande, V. S. "How International Arbitration Can Always Prevail Over Litigation", (1987) 4(4) *Journal of International Arbitration*, 9.

Deshpande, V. S. "International Commercial Arbitration: Uniformity of Jurisdiction", (1988) 5(2) *Journal of International Arbitration*, 115.

Deshpande, V. S. "Article V.1(e) of the 1958 New York Convention", (1991) 8(3) *Journal of International Arbitration*, 77.

Domke, Martin. "The United Nations Conference on International Commercial Arbitration", 53 *The American Journal of International Law*, 416 (1959).

Donahey, M. Scott. "The Independence and Neutrality of Arbitrators", (1992) 9 (4) *Journal of International Arbitration*, 31.

Eisemann, Frédéric. "Local Law and Private Rules of Procedure in Connection with International Commercial Arbitration", (1986) 2(1) *Arbitration International*, 73.

El-Hakin, Jacques. "Should the Key Terms Awards, Commercial and Binding be Defined in the New York Convention", (1989) 6(1) *Journal of International Arbitration*, 161.

Fawcett, J. J. "Evasion of Law and Mandatory rules in Private International Law", (1990) 49(1) *Cambridge Law Journal*, 44.

Fenwick, C. G. "The United Nations Conference of International Law", 53 *The American Journal of International Law*, 414 (1959).

Franck, Thomas M. "Fairness in the International Legal and Institutional System", (1993) 240 *Recueil Des Cours* III, 1.

Gabor, Francis A. "Stepchild of the New *Lex Mercatoria*: Private International Law from the United States Perspective", 8 *Northwestern Journal of International Law & Business*, 538 (1988).

Gaillard, Emmanuel. "Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules", 10(2) *ICSID Review*, 208 (1995).

Garita, Victor M. "Conceptual Basis for a New Arbitral Statute for Costa Rica: A New Approach in Latin America", 65 *Tulane Law Review*, 1633 (1991).

Garro, Alejandro M. "Unification and Harmonization of Private Law in Latin America", 40 *The American Journal Of Comparative Law*, 587 (1992).

Gertz, Craig M. "The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage", 12 *Northwestern Journal of International Law & Business*, 163 (1991).

Giardina, Andrea. "Court Decisions in Italy Interpreting and Implementing the New York Convention", (1990) 7(2) *Journal of International Arbitration*, 77.

Goldstajn, Aleksander. "The New Law Merchant", (1961) *Journal of Business Law*, 12.

Goode, Roy. "The Adoption of English Law to International Commercial Arbitration", (1992) 8(1) *Arbitration International*, 1.

Goode, "Usage and Its Reception in Transnational Commercial Arbitration", (1997) 46 *International and Comparative Law Quarterly,* 1.

Goodman, Rosabel E. Everard. "Choosing A Place for International Arbitration: The New York Option", (1985) 2(2) *Journal of International Arbitration*, 40.

Goodman, Ronald E. M. "UNCITRAL Model Law on International and Commercial Arbitration: Divergent Approaches in England and Scotland A Question of Appeal?", (1990) 18 (6) *International Business Lawyer*, 250.

Gross, Peter. "Competence of Competence: An English View", (1992) 8(2) *Arbitration International*, 205.

Gruson, Michael. "Governing Law Clause in Commercial Agreements - New York's Approach", 18 *Columbia Journal of Transnational Law*, 323 (1979).

Gutteridge, H. C. "Reciprocity in Regard to Foreign Judgements", 13 *British Yearbook of International Law*, 49.

Hacking, The Lord. "Where We Are Now: Trends And Developments Since The Arbitration Act (1979)", (1985) 2(4) *Journal of International Arbitration*, 7.

Harnik, Hans. "Recognition and Enforcement of Foreign Arbitral Awards", 31 *The American Journal of Comparative Law*, 703 (1983).

Harvard Law Review "Note: General Principles of Law in International Commercial Arbitration", 101 *Harvard Law Review*, 1816 (1988).

Henkin, Louis. (1989) "International Law: Politics, Values and Functions", (1989) 216 *Recueil Des Cours* IV 21.

Herrmann, Gerold. "UNCITRAL Adopts Model Law on International Commercial Arbitration", (1986) 2 (2) *Arbitration International*, 2.

Heuman, Lars. "Transplanting Arbitral Processes into Civil Procedure - A Swedish Perspective", (1988) 7 *Civil Justice Quarterly*, 156.

Highet, Keith. "The Enigma of the *Lex Mercatoria*", 63 *Tulane Law Review*, 613 (1989).

Hochstrasser, Daniel. "Choice of Law and "Foreign" Mandatory Rules in International Arbitration", (1994) 11(1) *Journal of International Arbitration*, 57.

Howard, M. N. "Floating Choice of Law Clauses", (1995) *Lloyd's Maritime & Commercial Law Quarterly*, 1.

Huang, Jin. and Qian, Andrew Xuefeng. ""One Country, Two Systems," Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflict of Law in China", 5 *Duke Journal of Comparative & International Law* 289 (1995).

Huang, Yanming. "Some Opinions about "Arbitration under Chinese Law", (1990) 8(1) *Journal of International Arbitration*, 51.

Huang, Yanming. "The Ethics of Arbitrators in CIETAC Arbitrations", (1995) 12(2) *Journal of International Arbitration*, 5.

Hudson, Richard. "Arbitration Bill", (1996) *New Law Journal*, 87.

Hulbert, Richard W. "Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration", (1989) 7 *International Tax & Business Lawyer*, 155.

Hunter, J. Martin H. "New Developments in English Procedure", (1987) 3(4) *Arbitration International*, 337.

Hunter, Martin. "*Lex Mercatoria*", (1987) *Lloyd's Maritime and Commercial Law Quarterly*, 277

Imhoos, Christophe. "The 1992 Geneva Chamber of Commerce and Industry Arbitration Rules under Scrutiny", (1992) 9(4) *Journal of International Arbitration*, 121.

Iwai, Nobuaki. "The Judge As Mediator: The Japanese Experience", (1991) 10 *Civil Justice Quarterly*, 108.

Jaffe, Paul A. C. "The Judicial Trend Toward Finality of Commercial Arbitral Awards in England", 24 *Texas International Law Journal*, 67 (1989).

Janis, M. W. "Equity and International Law: The Comment in the Tentative Draft", 57 *Tulane Law Review*, 80 (1982).

Jarvin, Sigvard. "The Sources and Limits of the Arbitrator's Powers", (1986) 2(2) *Arbitration International*, 140.

Javier, G. D. E. "The Role of Public Policy in International Commercial Arbitration", 21 *Law and Policy in International Business*, 389 (1990).

Jennings, Robert Y. "The "World Court" Is Necessary - A Regional Court", (1990) *Recueil Des Cour* Workshop, 305.

Jolowicz, J. A. "On the Nature and Purposes of Civil Procedural Law", (1990) 9 *Civil Justice Quarterly*, 262.

Journal of the Law Society of Scotland. "Arbitration", (1990, July) *Journal of the Law Society of Scotland*, 295.

Journal of the Law Society of Scotland. "Arbitration - Spreading the Message", (1992, June) *Journal of the Law Society of Scotland*, 223.

Juenger, Friedrich K. "The Recognition of Money Judgments in Civil and Commercial Matters", 36 *The American Journal Comparative Law*, 1 (1988).

Juenger, Friedrich K. "The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons", 42 *The American Journal of Comparative Law*, 381 (1994).

Karrer, Pierre A. & Kälin-Nauer, Claudia. "Is There A Favor *Iurisdictions Arbitri*? - Standards of Review of Arbitral Jurisdiction Decisins in Switzerland", (1996) 14(2) *Journal of International Arbitration*, 32.

Kaplan, Neil. "The Model Law in Hong Kong - Two Years On", (1992) 8(3) *Arbitration International*, 223.

Kaye, Peter T. "Transitional Scope of the Jurisdiction and Judgments Convention.", (1988) 7 *Civil Justice Quarterly*, 56.

Kerr, Michael. "International Arbitration v. Litigation", (1980) *Journal of Business Law*, 164.

Kerr, Michael. "The Enforcement of a Taiwanese Arbitration Award", (1990) 6 (2) *Arbitration International*, 167.

Kerr, Michael. "Equity Arbitration in England", 2 (4) *The American Review of International Arbitration*, 377 (1993).

Kishoiyian, Bernard. "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law", 14 *Northwestern Journal of International Law & Business*, 327 (1994).

Kuner, Christopher B. "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany under The New York Convention", (1990) 7(4) *Journal of International Arbitration*, 71.

Kunzlik, P. F. "Public International Law - Cannot Govern a Contract, Can Authorise An Arbitration", (1986) 45 *Cambridge Law Journal*, 377.

Lake, William T. and Dana, Jane Tucker. "Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?", (1984) 16 *Law & Policy in International Business*, 755.

Lalive, Jean-Flavien. "Contracts between A State or A State Agency and A Foreign Company", (1967) 13 *International & Comparative Law Quarterly*, 987.

Lando, Ole. "The *Lex Mercatoria* in International Commercial Arbitration", (1985) 34 *International and Comparative Law Quarterly*, 747.

Lando, Ole. "The Law Applicable to the Merits of the Dispute", (1986) 2(2) *Arbitration International*, 104.

Layton, Alexander. "The Interpretation of the Brussels Convention by the European Court and English Courts", (1992) 11 *Civil Justice Quarterly*, 28.

Lazareff, Serge. "Mandatory Extrateritorial Application of National Law", (1995) 11(2) *Arbitration International*, 137.

Lionnet, Klaus. "Should the Procedural Law Applicable to International Arbitration Be Delocalised or Unified? - The Answer of the UNCITRAL Model Law", (1991) 8(3) *Journal of International Arbitration*, 5.

Lookofsky, Joseph M. "Loose Ends and Controls in International Sales: Problems in the Harmonization of Private Law Rules", 39 *The American Journal of Comparative Law*, 403 (1991).

Lowenfeld, Andreas F. "*Lex Mercatoria*: An Arbitrator's View", (1990) 6(2) *Arbitration International*, 133.

Lowenfeld, Andreas F. "International Litigation and the Quest for Reasonableness", (1994) 1 *Académie de Droit International*, 225.

Luzzatto, Riccardo. "International Commercial Arbitration and the Municipal Law of States", (1977) *Recueil Des Cours* IV, 9.

MacNaughton, Donald T. "Arbitration and Dispute Settlement Procedures in Hong Kong", (1990) 10 *Private Investors Abroad*, 10-1.

Maher, G. "The Enforcement of Judgments in Scots Law", (1983) 2 *Civil Justice Quarterly*, 244.

Malynes, Gerard. "*Lex Mercatoria*: of Arbitrators and Their Awards (London, 1622)", (1993) 9(3) *Arbitration International*, 323.

Maniruzzaman, A.F.M. "Conflict of Laws Issues in International Arbitration: Practice and Trends" (1993) 9(4) *Arbitration International*, 371.

Mann, F. A. "Arbitration *Extra Legem*", (1978) 94 *The Law Quarterly Review*, 486.

Mann, F. A. "Reflections on England Civil Justice and the Rule of Law", (1983) 2 *Civil Justice Quarterly*, 320.

Mann, F. A. "England Rejects "Delocalised" Contracts and Arbitration", (1984) 33 *International & Comparative Law Quarterly*, 193.

Mann, F. A. "Private Arbitration and Public Policy", (1985) 4 *Civil Justice Quarterly*, 257.

Mann, F. A. "The Problem of Stale Arbitrations in England; A Possible Riddance of *Bremer Vulkan*?", (1986) 2(3) *Arbitration International*, 240.

Mann, F. A. "The UNCITRAL Model Law - *Lex Facit Arbitrum*", (1986) 2(3) *Arbitration International*, 241.

Marriot, Arthur L.. "The Politics of Arbitration Reform", (1995) 14 *Civil Justice Quarterly*, 125.

Marriot, Arthur L. "The New Arbitration Bill 1996", (1996) 62(2) *Arbitration*, 97.

Martin, D. F. "A Comparative Study of Enforcement in England and France", (1982) 1 *Civil Justice Quarterly*, 219.

Martiny, Dieter. "Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany" 35 *The American Journal Comparative Law*, 721 (1987).

Mayer, Pierre. "Mandatory Rules of Laws in International Arbitration", (1986) 2(4) *Arbitration International*, 274.

McCaffrey, Elizabeth M. "The Lugano and San Sebastian Conventions: General Effects", (1992) 11 *Civil Justice Quarterly*, 12.

McClendon, J. Steward. "Enforcement of Foreign Arbitral Awards in the United States", 4(1) *Northwestern Journal of International Law & Business*, 58 (1982).

McCormick, Caitlin. "The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine", (1984) 16 *Law & Policy in International Business*, 477.

McLaughlin, Joseph T. "Arbitrability Current Trends in the United States", (1996) 12(2) *Arbitration International*, 113.

Melis, Werner. "Enforcement of Foreign Awards in European Member-Countries of the Council for the Mutual Economic Assistance", (1986) 2(1) *Arbitration International*, 33.

Mettälä, Kimmo. "Governing-Law Clauses of Loan Agreements in International Project Financing", (1986) 20 *The International Lawyer*, 219.

Miller, Duncan. "Public Policy in International Commercial Arbitrations in Australia", (1993) 9(2) *Arbitration International*, 167.

Min, Chen. "The Arbitration Act of the People's Republic of China", *Journal of International Arbitration*, 12(4) (1995) pp. 29-49.

Moser, Michael J. "China's New International Arbitration Rules", (1994) 11(3) *Journal of International Arbitration*, 5.

Moser, Michael J. "China and the Enforcement of Arbitral Awards", (1995) *Arbitration*, 46.

Moser, Michael J. "China and the Enforcement of Arbitral Awards", (1995) *Arbitration*, 132.

Murray, John. "Letting Arbiters Get On with the Job", (1997) *SLT* 64.

Mustill, Michael John. "Transnational Arbitration in English Law", (1984) 37 *Current Legal Problems*, 133.

Mustill, Michael John. "Arbitration: History and Background", (1989) 6 *Journal of International Arbitration*, 43.

Mustill, Michael John. "Contemporary Problems in International Commercial Arbitration: A Response", (1989) 17 *International Business Lawyer*, 161.

Myers, James J. "Could Arbitration be Made A More Effective Method of Resolution of Construction Disputes?", (1991) 19(6) *International Business Lawyer*, 313.

Ngwasiri, C. N. "The Role of the Judge in French Civil Proceedings", (1990) 9 *Civil Justice Quarterly*, 167.

Nilsson, Hans G. "Arbitration and Anti-Trust - Enforcing Treble Damages from A Swedish Point of View", (1987) *Journal of Business Law*, 227.

North, Peter M. "Reform, but Not Revolution" (1990) 220 *Recueil Des Cours* I, 23.

Palmer, Vernon V. "The Many Guises of Equity in A Mixed Jurisdiction: A Functional View of Equity in Louisiana", 69 *Tulane Law Review*, 7 (1994).

Park, William W. "The *Lex Loci Arbitri* and International Commercial Arbitration", (1983) 32 *International and Comparative Law Quarterly*, 21.

Park, William W. "Judicial Control in the Arbitral Process", (1989) 5(3) *Arbitration International*, 230.

Park, William W. "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration", 63 *Tulane Law Review*, 647 (1989).

Paulsson, Jan. (1981) "Arbitration Unbound: Award Detached from the Law of Its Country of Origin" (1981) 30 *International & Comparative Law Quarterly*, 358.

Paulsson, J. "Delocalisation of International Commercial Arbitration: When and Why It Matters", (1983) 32 *International & Comparative Law Quarterly*, 53.

Paulsson, Jan. "Arbitration Unbound in Belgium", (1986) 2(1) *Arbitration International*, 68.

Paulsson, Jan. "May A State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration?", (1986) 2(2) *Arbitration International*, 90.

Paulsson, Jan. "Means of Recourse Against Arbitral Awards under US Law", (1989) 6(2) *Journal of International Arbitration*, 101.

Paulsson, Jan. "Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena", (1992) 9(1) *Journal of International Arbitration*, 59.

Peck, Sarah Catherine. "Playing by a New Set of Rules - Will China's new Arbitration Laws and Recent Membership in the ICC Improve Trade with China?", (1995) 12(4) *Journal of International Arbitration*, 51.

Penn, Graham. A. "Choice of Law Clauses in Commercial Agreements under New York and English Law", (1985) *Journal of Business Law*, 250.

Penn, Graham. A. and Thomas W. Cashel. "American Business Law - Choice of Law Clauses under English and New York Law - I", (1986) *Journal of Business Law*, 333.

Penn, Graham. A. and Thomas W. Cashel. "American Business Law - Choice of Law Clauses under English and New York Law - II", (1986) *Journal of Business Law*, 497.

Penn, Graham. A. and Thomas W. Cashel. "American Business Law - Choice of Law Clauses under English and New York Law - III", (1987) *Journal of Business Law*, 238.

Persey, Lionel. "Playing the Arbitration Game", (1983) 2 *Civil Justice Quarterly*, 97.

Pietrowski, Jill A. "Enforcing International Commercial Arbitration Agreements - Post-*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*", 36 *American University Law Review*, 57 (1986).

Polonsky, Michael. "Arbitration of International Contracts", (1971) *Journal of Business Law*, 1.

Poudret, Jean-François. "Challenge and Enforcement of Arbitral Awards in Switzerland", (1988) 4(4) *Arbitration International*, 278.

Prebble, John. "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws, - Part I", 58(3) *Cornell Law Review*, 433 (1973).

Prebble, John. "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws, - Part II", 58(4) *Cornell Law Review*, 635 (1973).

Pryles, Michael. "Current Issues in International Arbitration in Australia", (1992) 9(4) *Journal of International Arbitration*, 57.

Quigley, Leonard V. "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 70 *The Yale Law Review*, 1038 (1961).

Ramazani, Rouhollah K. "Choice-of-Law Problems and International Oil Contracts: A Case Study", (1962) 11 *International Comparative Law Quarterly*, 503.

Randall, Kenneth C. and Norris, John E., "A New Paradigm for International Business Transactions", 71 *Washington University Law Quarterly*, 599 (1993).

Rashkover, Barry W. "Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results.", 71 *Cornell Law Review*, 227 (1985).

Redfern, Alan. "International Commercial Arbitration", (1986) *Journal of Business Law*, 15.

Reilly, Mary T. "The Court's Power to Invade the Arbitrators' Deliberation Chamber", (1992) 9(3) *Journal of International Arbitration*, 27.

Rivkin, David W. "Enforceability of Arbitral Awards Based on *Lex Mercatoria*", (1993) 9(1) *Arbitration International*, 67.

Robine, Eric. "What Companies Expect of International Commercial Arbitration", (1992) 9(2) *Journal of International Arbitration*, 31.

Rogers, J. Andrew. "Contemporary Problems in International Commercial Arbitration", (1989) 17 *International Business Lawyer*, 154.

Rolph, Elizabeth. and Henslert, Deborah. "Court-Ordered Arbitration: The California Experience", (1984) 3 *Civil Justice Quarterly*, 163.

Rosett, Arthur. "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law", 40 *The American Journal of Comparative Law*, 683 (1992).

Rubino-Sammartano, Mauro. "International and Foreign Arbitration", (1988) 5(3) *Journal of International Arbitration*, 85.

Rubino-Sammartano, Mauro. "*Amicable Compositeur* (Joint Mandate to Settle) and *Ex Aequo Et Bono* (Discretional Authority to Mitigate Strict Law) - Apparent Synonyms Revisited", (1992) 9(1) *Journal of International Arbitration*, 5.

Samuel, Adam. " The 1979 Arbitration Act-Judicial Review of Arbitration Awards on The Merits In England", (1985) 2(4) *Journal of International Arbitration*, 53.

Samuel, Adam. "Arbitration in Western Europe - A Generation of Reform" (1991) 7(4) *Arbitration International*, 319.

Samuel, Adam. "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate", (1992) 8(3) *Arbitration International*, 257.

Sanders, Pieter. "Trends in the Field of International Commercial Arbitration", (1975) *Recueil Des Cours* II, 213.

Sanders, Pieter. "A Twenty-Years' Review on the Recognition and Enforcement of Foreign Arbitral Awards", (1979) 13 *The International Lawyer*, 269.

Sassoon, David M. "Choice of Tribunal and the Proper Law of the Contract", (1964) *Journal of Business Law*, 18.

Schmitthoff, Clive M. "Arbitration: The Supervisory Jurisdiction of the Courts", (1967) *Journal of Business Law*, 318.

Schreuer, Christoph H. "The Implementation of International Judicial Decisions by Domestic Courts", (1975) 24 *International and Comparative Law Quarterly*, 153.

Sedley, Stephen. "Improving Civil Justice", (1990) 9 *Civil Justice Quarterly*, 348.

Seidl-Hohenvelern, Ignaz. "Austrian Public Policy and the Enforcement of Foreign Arbitral Awards", (1988) 4(4) *Arbitration International*, 322.

Semple, Walter G. "New Scottish Arbitration Rules", (1991 January) *Journal of the Law Society of Scotland*, 33.

Sever, Jay R. "The Relaxation of Inarbitrability and Public Policy Checks on US and Foreign Arbitration: Arbitration Out of Control?", 65 *Tulane Law Review*, 1661 (1991).

Shenton, David W. & Toland, Gordon K. "London As a Venue for International Arbitration: The Arbitration Act 1979", (1980) 12 *Law & Policy in International Business*, 643.

Shihata, Ibrahim F. I. and Parra, Antonio R. "Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention", 9 *ICSID Review*, 183 (1994).

Shirazi, Akbar. "US District Court's Award in *Behring v. Iranian Air Force*: A Critical Viewpoint", (1987) 4(3) *Journal of International Arbitration*, 141.

Shum, Clement. "International Economic and Trade Arbitration in China", (1990) *Journal of Business Law*, 274.

Smit, Hans. "A-National Arbitration", 63 *Tulane Law Review*, 629 (1989).

Smith, Murray L. "Contractual Obligations Owed by and to Arbitrators: Model Terms Appointment", (1992) 8(1) *Arbitration International*, 17.

Sornarajah, M. "The Climate of International Arbitration", (1991) 8(2) *Journal of International Arbitration*, 47.

Spiro, Erwin. "England Rejected "Delocalised" Contract and Arbitration", (1984) 33 *International and Comparative Law Quarterly*, 193.

Stein, Ted L. "Jurisprudence and Jurists Prudence: the Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal", 78 *The American Journal of International Law*, 1 (1984).

Steyn, Johan. "Towards a New English Arbitration Act", (1991) 7(1) *Arbitration International*, 17.

Stoecker, Christoph W. O. "The *Lex Mercatoria*: To What Extent Does It Exist?", (1990) 7(1) *Journal of International Arbitration*, 101.

Stoel, Thomas B. "The Enforcement of Foreign Non-Criminal, Penal and Revenue Judgments in England and the United States", (1967) 16 *International and Comparative Law Quarterly*, 663.

Sullivan, Margaret Pedrick. "The Scope of Modern Arbitral Awards", 62 *Tulane Law Review*, 1113 (1988).

Symeonides, Symeon C. "Choice of Law in the American Court in 1993 (and in the Six Previous Years), 42 *The American Journal of Comparative Law*, 599 (1994).

Tetley, William. "The General Maritime Law - The *Lex Maritima*.", 20 *Syracuse Journal of International Law and Commerce*, 105 (1994).

Tabalujan, Benny S. "Singapore's Adoption of the UNCITRAL Model Law on International Commercial Arbitration - Some Preliminary Observations", (1995) 12(2) *Journal of International Arbitration*, 51.

Thieffry, Jean. "The Finality of Awards in International Arbitration", (1985) 2(3) *Journal of International Arbitration*, 27.

Thomas, D. Rhidian. "Commercial Arbitration - Justice According to Law", (1983) 2 *Civil Justice Quarterly*, 166.

Thomas, D. Rhidian. "The Judicial Supervision of Arbitral References Involving An Allegation of Fraud", (1990) 9 *Civil Justice Quarterly*, 381.

Thomas, D. Rhidian. "Reflections on Recent Judicial Development of the Concept of A Convention Award", (1992) 11 *Civil Justice Quarterly*, 352.

Thomas, D. Rhidian. "Arbitration Agreement as A Signpost of the Proper Law", (1984) *Lloyd's Maritime and Commercial Law*, 141.

Tupman, W. Michael. "Staying Enforcement of Arbitral Awards under the New York Convention", (1987) 3(3) *Arbitration International*, 209.

Ungar, T. Kenneth. "The Enforcement of Arbitral Awards under UNCITRAL Model Law on International Commercial Arbitration", *Columbia Journal of Transnational Law*, 717 (1987).

van den Berg, Albert J. "Recent Enforcement Problems under the New York and ICSID Conventions", (1989) 5(1) *Arbitration International*, 2.

Vigoriti, Vincenzo. "Recent Developments in the Recognition and Execution of Foreign Judgments and Arbitral Awards in Italy", (1987) 6 *Civil Justice Quarterly*, 248.

von Mehren, Arthur Taylor. "Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States", 81 *Columbia Law Review*, 1044 (1981).

von Merhren, Arthur Taylor. "International Commercial Arbitration: The Contribution of the French Jurisdiction", 46 *Louisiana Law Review*, 1045 (1986).

Wallace, I. N. Duncan. "Control by the Courts: A Plea for More, Not Less", (1990) 6(3) *Arbitration International*, 253.

Wang, Guiguo. "The Unification of the Dispute Resolution System in China", (1996) 13(2) *Journal of International Arbitration*, 5.

Wehrli, Daniel. "New Swiss Law on International Arbitration", (1989) *International Business Lawyer*, 165.

Weinberg, Karyn S. "Equity in International Arbitration: How Fair is Fair?", 12 *Boston University International Law Journal*, 227 (1994).

Weinreb, A. "Arbitration Clauses in Multilateral International Agreements", (1975) *Journal of Business Law*, 287.

Weir, Michael E. L. "Arbitration in Scotland", (1987) 4 *Journal of International Arbitration*, 41.

Westin, David. "Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England", (1987) 19 *Law & Policy in International Business*, 325.

Westin, David., & Chrocziel, Peter. "Interim Relief Awarded by US and German Courts in Support of Foreign Proceedings", 28 *Columbia Journal of Transnational Law*, 723 (1990).

Wetter, J. Gillis. "Choice of Law in International Arbitration Proceedings in Sweden", (1986) 2(4) *Arbitration International*, 294.

Wetter. J. Gillis. "The Internationalization of International Arbitration: Looking Ahead to the Next Ten Year", (1995) 11(2) *Arbitration International*, 117.

Wilkinson, Vanessa L. D. "The New *Lex Mercatoria* - Reality or Academic Fantasy?", (1995) 12(2) *Journal of International Arbitration*, 103.

Williams, Rowland. "Should the State Provide Alternative Dispute Resolution Service", (1987) 6 *Civil Justice Quarterly*, 142.

Winter, Jeremy B., & Connor, Christopher J. "International Arbitration - Mistakes of Foreign Law", (1991) 4 *Journal of Contract Law*, 37.

Yakovlev, Igor Ivanovich. "Establishing A Common Legal Space in Europe and Peaceful Settlement of Disputes", (1990) Workshop *Recueil Des Cours*, 439.

Yan, Rong R. and Kuner, Christopher. "The New Arbitration Rules of the China International Economic Trade and Arbitration Commission", (1995) 11(2) *Arbitration International*, 183.

Zhilsov, A. N., "Mandatory and Public Policy Rules in International Commercial Arbitration", (1995) XLII *Netherlands International Law Review*, 81.

Zhou. Hairong. "The Re-establishment of the Chinese Legal System: Achievements and Disappointment", (1991) 10 *Civil Justice Quarterly*, 44.